

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Accelerating Wireless Broadband Deployment
by Removing Barriers to Infrastructure
Investment

FCC 17-38

WT Docket No. 17-79

COMMENTS OF FAIRFAX COUNTY, VIRGINIA

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June 15, 2017

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SUMMARY

A fundamental principle of economics instructs that people respond to incentives. One economist has suggested that the entire field of economics could be summarized as “People respond to incentives. The rest is commentary.”¹ Rather than unleash this principle on industry—where targeted incentives could truly accelerate deployment²—the Commission proposes to impose more rules and (supposed) remedies on local governments.

This approach would be ineffective and tone deaf. The threat of a “deemed approved” remedy provides no inducement to act when localities are already stretched to the limit of staff time and resources. Instead of responding to localities’ real constraints, the Commission also hints at imposing limits on fees for review of applications. Taken as a whole, the Commission’s strategy seems intended to force local governments to rubber-stamp wireless facility siting applications—a result Congress never intended when it preserved local zoning authority in Section 332(c)(7) of the Telecommunications Act of 1996.³

Even more troubling, the Commission proposes further rulemaking when it has already reached the limit of its authority under Section 332. Congress plainly created a judicial remedy for alleged violations of Section 332(c)(7), leaving no ambiguity for the Commission to resolve. Creating an alternative remedy—whether characterized as “deemed approved,” an irrebuttable presumption, or a “lapse of authority”—would amount *to ultra vires* legislation by the

¹ See N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 7-8 (7th ed. 2015) (defining an incentive as “something (such as the prospect of a punishment or reward) that induces a person to act”).

² As discussed below, these incentives might include a “deemed denied” remedy for deficient applications that are not timely completed or increased fees to allow localities to hire more reviewers. *See infra* at 9.

³ 47 U.S.C. § 332(c)(7)(A).

Commission. It would also intrude on the primacy of the courts. Congress entrusted courts to adjudicate disputes under Section 332 and they have capably done so for the past 20 years.

The Commission should also refrain from rulemaking because state and local governments are already removing unnecessary impediments to wireless broadband infrastructure deployment. The Virginia General Assembly adopted new legislation that takes effect statewide on July 1, 2017, to streamline an administrative zoning approval process for small cell facilities. Fairfax County expects to begin issuing small cell zoning permits almost immediately. The County already has a strong record of approvals, demonstrating its support for wireless infrastructure deployment, and the administrative small cell zoning permit will further streamline the process.

Because state and local governments are already proactively facilitating wireless infrastructure deployment, the Commission need not intrude on the courts or the states with further rulemaking at this time. If the Commission nevertheless takes some action, it should give attention to creative and flexible approaches that focus on industry's role in accelerating deployment.

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Fairfax County asks the Commission to refrain from any rulemaking at this time, because the Commission has already reached the limits of its authority under 47 U.S.C. § 332(c)(7).⁴ If the Commission does issue rules, Fairfax County asks that it exempt Virginia and other states that have already adopted small cell regulations facilitating next-generation wireless deployment. The County also asks the Commission to refrain from revisiting its 2009 Declaratory Ruling⁵ and its October 21, 2014, Report and Order⁶ that established timeframes for the processing of wireless tower and antenna siting requests.

I. Fairfax County and the Virginia General Assembly have a record of removing unnecessary impediments to wireless applications.

The record does not support the notion that further federal regulation is needed. On the contrary, local communities are already handling the flood of new wireless applications on a reasonable basis, and state laws already establish sufficient protections for the wireless industry.

A. Fairfax County supports prompt deployment.

Fairfax County's strong record of approvals reflects its support for smart wireline and wireless broadband deployment. From 2010 to 2016, Fairfax County received over 650 wireless

⁴ See Comments of the Virginia Joint Commenters ("Virginia Joint Comments"), filed on March 8, 2017, and attached as Exhibit 1, at 26-27; *see also City of Arlington v. FCC*, 668 F.3d 229, 250 (5th Cir. 2012) (upholding the Commission's authority to interpret existing requirements of § 332(c)(7)(B), but noting that the agency had no power to impose additional limits on local authority).

⁵ See *2009 Declaratory Ruling*, 24 FCC Rcd. 13994 (2009), *recons. denied*, 25 FCC Rcd. 11157 (2010), *aff'd sub nom. City of Arlington, Texas*, 668 F.3d 229, *aff'd* 133 S. Ct. 1863 (2013).

⁶ *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, FCC 14-153, Oct. 21, 2014, WT Docket No. 13-238, 29 FCC Rcd. 12,842, 80 Fed. Reg. 1238 (Jan. 8, 2015).

telecommunications applications and denied only 4 of them.⁷ In Fiscal Year 2016, the County received and approved 115 applications under the Spectrum Act.⁸ The County has also exercised flexibility in response to industry requests. Last year, for example, the County accepted, reviewed, and approved 80 DAS nodes in 3 batched applications containing 25, 32, and 23 nodes.⁹

B. Virginia Code § 15.2-2232 review incorporates fixed deadlines.

In Fairfax County, land use review of telecommunication facilities is governed by state law and the Fairfax County Zoning Ordinance.¹⁰ Virginia Code § 15.2-2232 ensures that the location, character, and extent of certain public features—such as streets, parks, and utilities, including telecommunications facilities—occurs within the framework of a comprehensive plan. Fairfax County’s Comprehensive Plan is a long-term planning guide that represents the culmination of community land use review and analysis.¹¹ Applications involving features that fall under § 15.2-2232 are reviewed to determine whether they comport with the Comprehensive Plan—a process generally referred to as “2232 review.”

All telecommunications facilities, other than applications that fall under the Spectrum Act, currently undergo 2232 review in Fairfax County.¹² As detailed below, first-time,

⁷ See Declaration of Chris Caperton ¶ 8, attached to Fairfax County’s Reply Comments filed with the Commission on April 7, 2017, and attached here as Exhibit 2.

⁸ See Second Caperton Decl. ¶ 3, attached as Exhibit 3.

⁹ See Ex. 2, Caperton Decl. ¶ 12.

¹⁰ For a detailed discussion of this land use review process, see Virginia Joint Comments at 9-15.

¹¹ *Fairfax County Comprehensive Plan*, <http://www.fairfaxcounty.gov/dpz/comprehensiveplan/>.

¹² After July 1, 2017, small cell facilities will be approved by an administrative zoning permit, rather than being subject to 2232 review. See *infra* at 5 regarding Senate Bill 1282.

standalone facilities, such as monopolies, must undergo 2232 review with a public hearing, because the feature is not yet shown on the Comprehensive Plan. Such a hearing ensures that the most directly affected persons have a chance to make known any specific concerns or issues created by the application.

Virginia Code § 15.2-2232(F) imposes strict and expedited time limits on the review of applications for new telecommunication facilities. The statute requires a Planning Commission to act on such an application within *90 days* after it is submitted, unless the applicant agrees to an extension of time or the local governing body authorizes an extension of time, not to exceed *60 additional days*. If the Planning Commission fails to act within these time limits, *the application is deemed approved*. Va. Code § 15.2-2232(F).

While the deadlines imposed under Va. Code § 15.2-2232 require expedited review, they are still reasonable enough to accommodate staff investigation and public hearings, if necessary. Once an application is submitted, County staff reviews it, identifies deficiencies, and coordinates with the applicant to bring the application into compliance with all applicable laws. Applications involving new monopolies require sufficient staff time to investigate potential impacts and site alternatives, prepare a staff report, and advertise and participate in public hearings.¹³ Public hearings must be advertised once a week for two weeks, and the ads may not run less than 5 days or more than 21 days before the hearing.¹⁴ Because of these advertising requirements, which apply to all such land use applications that require a public hearing, the time allotted to staff to process applications is already compressed to the maximum extent possible.

¹³ Applications for features that are not already shown on the adopted Comprehensive Plan, typically new monopolies and towers, require a public hearing before the Planning Commission pursuant to Va. Code § 15.2-2232(A).

¹⁴ Va. Code § 15.2-2204(A).

Collocations on structures that are not already developed with wireless facilities (or that involve substantial modifications outside the Spectrum Act) are reviewed by the Planning Commission for decision, typically without a public hearing, as to whether the proposed facility is a “feature shown” on the Comprehensive Plan. The Planning Commission completes its review in compliance within the 90-day shot clock that applies to collocations. These applications still involve staff time in reviewing them and preparing them for Planning Commission decision. Finally, applications involving an eligible facilities request for modification to an existing tower or base station that would not substantially change its physical dimensions are timely reviewed and approved under the Spectrum Act.¹⁵

C. Fairfax County has reduced tension and facilitated deployment.

To reduce tension between deployment and public interest, Fairfax County’s Department of Planning and Zoning encourages applicants to seek the input of the Planning Commissioner and the community. This process gives applicants an opportunity to explain the reasons for the installation, proposed design, and impacts. It gives the public the chance—before any public hearing—to provide constructive feedback. The result is often a better planned and designed project with community understanding, if not endorsement.¹⁶

In the County, the Commission’s 2014 Infrastructure Order, establishing timeframes for decisions under the Spectrum Act, has been successful. The County has thousands of approved

¹⁵ 47 U.S.C. § 1455 (“Section 6409 of the Spectrum Act”).

¹⁶ This process provides an example of “steps the industry can take outside the formal application review process that may facilitate or streamline such review,” and an example of steps that have been effective in “resolving tensions among competing priorities of network deployment and other public interest goals.” *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 ¶ 6-7 (April 21, 2017) (“NPRM/NOI”).

sites (base stations and towers), and the ability to approve facility upgrades through administrative action has saved staff time. The limited scope of the Order—relating only to base stations that have undergone an original zoning review—balances local zoning with industry interests.¹⁷

D. Virginia legislation will facilitate next-generation wireless.

The Virginia General Assembly has already updated the permissible regulatory framework in response to the demands of next-generation wireless.¹⁸ Senate Bill 1282,¹⁹ adopted this year and effective July 1, 2017, facilitates network infrastructure deployment by requiring a uniform process for administrative zoning review of small cell facilities.²⁰ The bill also requires the Virginia Department of Transportation to allow access to its rights-of-way for installation of small cells on existing structures, and it authorizes localities to issue a permit granting access to locally-managed rights-of-way for installation of small cells on existing structures.²¹ Thus, any “regulatory barriers” have already been removed in Virginia.

Fairfax County has already started to implement SB 1282 and expects to have a new administrative zoning permit process in place by July 1, when the legislation takes effect as new Virginia Code § 15.2-2316.4.²² Thus, any further efforts to accelerate deployment should be directed to the other half of the picture: encouraging industry cooperation in the review process.

¹⁷ See NPRM/NOI at ¶ 6.

¹⁸ Virginia Joint Comments at 6.

¹⁹ See 2017 Va. Acts ch. 835.

²⁰ Virginia Joint Comments at 6.

²¹ *Id.*

²² Similar laws have passed, or are under consideration, in other states. See, e.g., LegiScan’s state-by-state map at <https://legiscan.com/maps/2bs4tzsa> (accessed 6/8/2017).

II. The Commission should focus on industry’s role in streamlining the review process.

A. Industry should be a partner, not an adversary, in streamlining deployment.

The Commission should ask whether there is still a real problem with wireless broadband deployment. If so, what is causing it?

Instead of such thoughtful inquiry, the Commission’s rush to propose well-worn solutions—e.g., a “deemed approved” remedy—does not reflect any empirical evidence showing that this remedy will solve the problem. In fact, if there is any problem on the state or local end, it is the limitations on staff time and resources, which the Commission does not propose to address. Imposing ever stricter deadlines and harsher penalties, while limiting fees that localities may collect (fees that might otherwise allow localities to hire additional review staff), will only exacerbate the problem.²³ A more effective solution would be to require greater industry buy-in: requiring applicants to submit complete applications, remedy deficiencies in a timely fashion, and pay fairly for review of permit applications.

Fairfax County is an example of an industry and locality partnering to improve results. Here, the development community worked closely with the County to speed up review and processing of site plans and permits, while the County sought to enhance its economic growth and success. To achieve both of these goals, the Board of Supervisors created a program known as “Fairfax First,” made up of several strategies. One such strategy, the “Booster Shot,” involved

²³ The NPRM/NOI ignores these burdens; it appears to assume that local governments have unlimited resources and that any limitations on processing speed are a result of culpable foot-dragging. For example, while the Initial Regulatory Flexibility Analysis (IRFA) appended to the NPRM/NOI acknowledges that “small governmental jurisdictions” are among the entities protected by the Regulatory Flexibility Act, it *asserts* that federal regulation will reduce regulatory costs for applicants, but merely requests comment on the economic impact on small communities. IRFA at ¶¶ 4, 33, 36, 38. Shot clocks, by definition, require more work in a shorter time and thus impose economic burdens on already-struggling localities.

raising land development fees by 20%, with the support of the development community. It resulted in the following outcomes: (1) 28 positions added County-wide; (2) funding for a comprehensive assessment by a consulting team; and (3) an expedited development plan/permit review process.²⁴ As this program illustrates, localities and industry can make greater strides working together than working at cross purposes.

B. Industry should be required to submit timely and complete applications.

County staff has found that applicants often submit incomplete or inaccurate applications. Applications frequently fail to accurately depict the number and diameter of proposed antennas or describes the proposed location of the facility only in general terms, without the precise location or size of the proposed facility and the number, location, and size of the proposed antennas.²⁵ Without this key information, it is impossible to engage in meaningful review of a zoning application.

In addition, applicants do not always timely answer staff's requests to correct deficiencies.²⁶ Drawings are often re-submitted with the same errors and omissions. In other words, until the wireless carrier has fully formed its proposal and committed to pursuing it, submitting an application is premature. County staff cannot do the work for the carrier.²⁷

²⁴ See Fairfax First Update materials from the Board of Supervisors' Development Process Committee meeting on February 7, 2017, <http://www.fairfaxcounty.gov/bosclerk/board-committees/meetings/2017/feb7-development-fairfax-first.pdf>.

²⁵ See Ex. 3, Caperton Decl. ¶ 4.

²⁶ *Id.*

²⁷ For a similar example, see comments filed in docket 17-79 by the Missouri State Historic Preservation Office, available at <https://ecfsapi.fcc.gov/file/10602261731475/Microsoft%20Word%20-%20MO%20SHPO%20Comments%20FCC%20removing%20barriers%20to%20infrastructure%20investment.docx.pdf>.

As these problems illustrate, the incentives in the system proposed in the NPRM/NOI are all wrong. If industry wants its applications reviewed quickly, it should be a partner in that exercise, willing to pay a fair price to make that happen. Industry knows that localities must comply with strict deadlines to review applications.²⁸ That incentivizes applicants to submit incomplete or sloppy applications, because the entire burden of complying with deadlines rests on the localities.²⁹

Further, the willingness of the wireless industry to cut corners is vividly demonstrated by Sprint's memorandum instructing its contractors not to comply with local requirements.³⁰ The unlawful Sprint venture also provides empirical evidence that even complete evasion of regulatory requirements did not significantly speed up deployment—which means the Commission's proposed preemption of local requirements in the NPRM/NOI would likely also be ineffective.

Rewarding applicants' errors and omissions with a "deemed approved" remedy would simply encourage providers to submit incomplete applications and take advantage of the limited and administratively burdensome tolling provisions authorized by the Commission's 2014 Wireless Siting Order. It would also preclude localities from getting the information needed to make an informed zoning decision, culminating in a "gotcha" moment where the local government is deemed to have approved the application based on the expiration of an arbitrary clock. Such a counterproductive outcome would all but eliminate local zoning authority over

²⁸ Virginia Joint Comments at 31.

²⁹ *Id.*

³⁰ See Exhibit 4, April 25, 2017, Sprint e-mail regarding DO Deployment Alert: Mini Macro Trial (illustrating wireless companies' deliberate evasion of zoning review in some cases).

telecommunications facilities in direct violation of the Congressional preservation of such authority in the Telecommunications Act.

C. Innovative approaches the Commission can consider.

To recalibrate this incentive system, the Commission could implement a “deemed denied” rule if providers fail to correct deficient applications within a reasonable time after receiving notice of deficiencies. Further, any applicable shot clock should be tolled whenever an applicant fails to provide requested information by the local community’s deadlines. This should be true regardless of whether the information was part of the locality’s request within the first 30 days: the ongoing work of analyzing an applications and working with the applicant can cause new questions to arise, especially if the applicant submits new information.

Industry could also streamline efforts by bundling only related applications. In a county of 400 square miles, there are material differences between different areas. Staff can improve efficiencies and reduce review time by reviewing groups of similar applications, but this advantage is lacking if the grouped applications are unrelated.

The Commission could turn its attention to potential infrastructure partners, such as utility companies, whose phone and light poles industry seeks to use. It would be ironic if the Commission were to issue rules focused on localities, only to find the lead times unchanged, due to the same problem that has existed all along: providers must get permission from structure/utility pole owners who do not necessarily share their interest in collocation.

The Commission should also take steps to ensure that the regulatory benefits it confers on providers actually produce results. For example, to invoke any Commission-imposed deadlines, the applicant could be required to show that previous applications under the same federal rules actually accelerated deployment. Similarly, the Commission could require such an applicant to complete construction and put the proposed facilities into service by a given date or be barred

from future use of the federal deadlines. Or, conversely, a locality could have the right to cite an applicant's previous failure to meet application-related deadlines as a defense against the applicant's claim under the federal rules.

Another way of ensuring that some genuine benefits result from the proposed regulatory favors could be to condition any use of the federal rules against localities on the elimination of the data caps imposed on subscribers by the providers that use the facilities. The point of the carriers' vast expansion of antenna sites, after all, is supposed to be to reduce or eliminate the alleged capacity deficiencies that carriers claim as justification for the caps.

What is essential is that any new federal regulations must guarantee the beneficial effects for which the NPRM/NOI proposes to supersede local self-governance. To grant new regulatory favors without such assurance is simply to buy a pig in a poke.

In suggesting such innovative approaches, the County is not taking the position that the proposals of the NPRM/NOI are reasonable, much less that the Commission has legal authority to impose the proposed regulations. We stated at the outset that the Commission should not adopt new rules in this proceeding at all. Rather, we simply seek to show that, if the Commission *were* authorized to adopt such rules, it should give attention to creative and flexible approaches.

III. The Commission should not impose a "deemed approved" remedy.

The NPRM/NOI implies a contradictory proposition: "current shot clock rules are not working, and therefore, the Commission must impose more shot clock rules."³¹ More rules of this nature don't fix the fundamental problems with a "deemed approved" remedy. The approach fails to account for the size of a community, the volume of applications, how many applications are bundled, and the extent to which those bundled applications include sites from various areas

³¹ Virginia Joint Comments at 30.

of the jurisdiction. Fairfax County, for example, has a population of over 1.1 million people—larger than eight states and the District of Columbia—and covers 400 square miles. The County processes hundreds of applications per year for telecommunications facilities, among many other applications for other types of facilities. Nevertheless, under the shot clock deadlines, every telecommunications application in Fairfax must be analyzed within the same time frame as one for a small town in Iowa.

In March 2014, Fairfax County submitted comments to the Commission showing that industry had failed to identify any widespread or systemic delays in the processing of eligible facilities requests or other telecommunications applications. Industry could not even begin to make the case that local and state governments unnecessarily delay decision on such applications. On the contrary, despite the number and variety of wireless applications increasing every year, Fairfax County has never missed a deadline. But that timeliness has sometimes taken considerable effort and good fortune, without which even the County’s best intentions could have been frustrated by circumstances beyond its control.

It’s hard to imagine that the threat of a lawsuit is not incentive enough for localities to comply with shot clock deadlines. But even if some isolated locality occasionally misses a deadline, that can’t give the Commission authority it doesn’t already have to create a “deemed approved” remedy.

A. Federal law has already established the remedy for alleged violations of § 332(c)(7).

Congress expressly preserved state and local zoning authority over the siting of telecommunications facilities in § 332(c)(7) of the Telecommunications Act of 1996 (“the Act”), subject only to the express restrictions and requirements in the Act. Congress did not impose on local governments special time limits for processing approvals that place a telecommunications

carrier in a superior position to those of all other zoning applicants. Rather, the Act was directed at ensuring that telecommunications facilities are treated in the *same manner* as all other facilities and at preventing a local government from effectively prohibiting the provision of wireless services.

Congress has already created the remedy for an alleged violation of these provisions. Section 332(c)(7)(B)(ii) expressly states that any person aggrieved by any state or local government's final action or failure to act "may, within 30 days after such action or failure to act, commence an action in a court of competent jurisdiction."³² This unambiguous provision leaves no room for the Commission to encroach on the authority of the courts. Thus, the Commission is overreaching if it presumes that it has any authority to create a "deemed approved" remedy.³³ The United States Supreme Court has held that § 332(c)(7) of the Act explicitly creates a judicial remedy and from this it can be inferred that Congress intended to exclude all other alternative remedies.³⁴

Because Congress has already provided an exclusive remedy for any failure by a local government to act, the Commission lacks the legal authority to create its own remedies, either through deeming an application automatically approved or by establishing an irrebuttable presumption. If Congress had wanted to impose such a draconian remedy on the localities its members represent, it would have done so. It is not within the Commission's authority to make that leap.

³² 47 U.S.C. 332(c)(7)(B)(ii).

³³ *City of Arlington, Texas*, 668 F.3d at 236 (referencing the Commission's conclusion, in its 2009 Declaratory Ruling, that § 332(c)(7)(B)(v) indicates Congress's "intent that courts should have the responsibility to fashion case-specific remedies" and rejecting a "deemed granted" remedy on that basis).

³⁴ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005).

Further, in directing zoning authorities to “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed,” the Act explicitly directs that reasonableness be measured by “*taking into account the nature and scope of such request.*” 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). The legislative history of this section emphasizes that point:

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, *the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.*³⁵

Congress explicitly rejected the sort of blunt instrument that a “deemed approved” approach represents.

B. The Commission has already admitted that applications should not be deemed approved.

In its 2009 Declaratory Ruling, the Commission expressly rejected the industry’s request for a “deemed approved” provision, which would hold that applications not acted on within the presumptive timeframes would be “deemed approved.”³⁶ Specifically, the Commission explicitly stated:

We reject the Petitioner’s proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granted the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that “[t]he court will hear and decide such action on an expedited basis.”³⁷

³⁵ H.R. Conf. Rep. No.104-458, at 208 (emphasis added).

³⁶ See 2009 Declaratory Ruling (“Decl. Ruling”), 24 FCC Rcd. 13994 ¶ 39.

³⁷ Decl. Ruling ¶ 39.

Because Congress has already determined that disputes arising under the Act should be decided by the courts—and the Commission has conceded as much—the Commission lacks authority to modify the statutory provision by adopting a “deemed approved” remedy for applications that are decided outside the timeframes the Commission presumes reasonable.

As the Commission noted in the Declaratory Ruling, “the case law does not establish that an injunction granting the application is always or presumptively appropriate when a ‘failure to act’ occurs.”³⁸ Courts examine the particular facts in a case before determining what remedy is appropriate for any failure to timely act on an application for a personal wireless facility.³⁹ That analysis obviously could not occur if the application were deemed approved. Nor is this a trivial problem. In some cases, courts have found that a delay beyond statutorily mandated timeframes was entirely defensible.⁴⁰ Even the Commission stated that it is “important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.”⁴¹

Notwithstanding the Commission’s prior pronouncements, it once again appears to be prepared to deem applications approved if a locality doesn’t comply with presumptive federal time frames—regardless of the cause of the delay. For the same reasons the Commission articulated in its own 2009 Declaratory Ruling, it should reject such a crude “remedy.”

Congress has explicitly stated that disputes under the Act must be resolved by the courts, on an expedited basis after a review of all of the facts of a particular case. Imposing a “deemed

³⁸ Decl. Ruling, ¶ 39.

³⁹ *Id.*

⁴⁰ *See, e.g., New York SMSA Ltd. P’ship v. Town of Riverhead Town Bd.*, 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000); *Sprint Spectrum, L.P. v. Zoning Hearing Bd. of Williston Twp.*, 43 F. Supp. 2d 534, 539 (E.D. Pa. 1999).

⁴¹ Decl. Ruling, ¶ 39.

approved” standard would run afoul of this explicit Congressional direction and constitute action outside the Commission’s statutorily defined authority.

1. The Commission cannot expand its authority to fashion a remedy by creating an “irrebuttable presumption” or a “lapse of authority.”

The imposition of fixed deadlines for consideration of telecommunications facility applications flies in the face of 332(c)(7)(B)(ii), which states that the amount of time allowed for acting on a telecommunications facility siting application must necessarily take “into account the nature and scope of such request.” The Commission asserts that it would exercise the power to review the “nature and scope of request” in creating an irrebuttable presumption.⁴² That assertion, however, is incoherent. A blanket remedy created before a request is even filed, based on a federal prejudice about which party is to blame, cannot take into account the particulars of any request. The only reason for such a proposal is that the Commission knows it lacks authority to impose a “deemed approved” remedy. An irrebuttable presumption would have the same effect, but in some ways would be even worse, because a locality would still be subjected to the time and expense of litigation without the chance to mount a genuine defense.

The Commission has also asked whether it may deprive localities of authority if they fail to act within the presumptive timeframes, by calling such inaction a “lapse of authority.” There is no suggestion in the statute that local authority somehow lapses or is lost simply because a federally created deadline passes.

And even if local authority did somehow lapse if the locality failed to act within the Commission’s presumptive timeframes, the Act does not then give the Commission any greater authority. The remedy remains the same as in any other circumstance under § 332(c)(7):

⁴² See NPRM/NOI at ¶ 12.

petitioning a court for relief. An applicant can argue for a court to find that the local authority lapsed and the application should be deemed approved, but that is not for the Commission to determine through a general rulemaking process. Characterizing this remedy as a “lapse of authority” is just another name for the same old *ultra vires* idea.

The NPRM/NOI goes to considerable lengths to impose the Commission’s presumptions on the entire universe of local government actions. That fact adds to the County’s concern that the Commission’s majority has already made up its mind on these issues and is not open to contrary evidence. Evidence to that effect can be found in the Commission’s decision not to wait for reply comments in the closely related Mobilitie proceeding before deciding on proposed rules in this proposal.⁴³

Moreover, the Commission has already established a “Broadband Deployment Advisory Committee” (BDAC), fully controlled by and with voting membership largely composed of supporters of industry positions. Of this effort the Chairman said: “One important part of this work, which I previewed last fall, is to develop model codes for state and municipal governments.”⁴⁴ In other words, even before the Commission receives any comments in this present proceeding, it has already assigned a group to define what a local ordinance should look like—a group composed not of local zoning experts, but of those seeking heavier federal regulation of local communities. Apparently, the Chairman already knows where this proceeding is going, regardless of what comments may be filed.

⁴³ The NPRM/NOI was circulated in completed draft form on March 30, 2017. The deadline for reply comments in the Mobilitie proceeding was April 7, 2017.

⁴⁴ Remarks of FCC Chairman Ajit Pai at the First Meeting of the Federal Communications Commission’s Broadband Deployment Advisory Committee, April 21, 2017, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0421/DOC-344513A1.pdf.

This rush to judgment is even more striking because it ventures into areas beyond the Commission’s expertise. The Commission is not staffed with zoning experts. On the contrary, as Commissioner O’Rielly said of localities about state and local privacy rules, “They don’t know the scope of what they’re doing because it’s not something that they’ve had to do before.”⁴⁵ Yet the Commission is prepared to prescribe “guidance” for local communities on wholly local zoning matters.⁴⁶ On such matters the Commission has no established expertise and cannot logically claim a right to judicial deference.

2. Section 253(a) does not augment the Commission’s rulemaking authority.

The Supreme Court has held that when Congress draws a “clear line” in defining an agency’s authority, the agency cannot go beyond that line.⁴⁷ By expressly excluding § 253(c) from the Commission’s preemptive authority, Section 253(d) draws such a line.⁴⁸ The Commission may determine, on a case-by-case basis, whether a local requirement amounts to a prohibition on service under § 253(a); however, its general authority to construe the statute does not include § 253(a), because it cannot identify a general class of local requirements that could universally be considered a prohibition.⁴⁹

IV. The Commission has already ruled on what it deems a reasonable period of time to Act and it should refrain from muddying the waters.

The Commission’s request for comments about “harmonizing”—a euphemism for reducing by 30 days—the “reasonable time” for non-Spectrum Act collocation review reveals the

⁴⁵ *Communications Daily*, May 9, 2017, at 11, *quoting* Commissioner O’Rielly’s speech at a seminar of the Federal Communications Bar Association, May 6, 2017.

⁴⁶ NPRM/NOI at ¶ 92.

⁴⁷ *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1874 (2013).

⁴⁸ Virginia Joint Comments at 41-42.

⁴⁹ Virginia Joint Comments at iii. 41.

one-sidedness of the Commission's solicitation. The reason Spectrum Act review is subject to a compressed schedule is that the proposed facilities must be limited in size and scope and the base station or tower on which they are located has already been subjected to an initial zoning process. That would not necessarily be the case for non-Spectrum Act collocations. Because the two types of collocation differ in those crucial respects, there is no justification for reducing the review deadline for non-Spectrum Act collocations.

Even more troubling, the Commission not only proposes to reduce localities' time to review, but it simultaneously proposes to deem an application approved if the review does not occur within that reduced time. The Commission has also signaled to localities that fees for wireless siting reviews are being closely scrutinized. Considering these proposals as a whole, it appears that the Commission is intent on toppling the delicate balance Congress struck in § 332(c)(7).

Here, again, the Commission proposes to duplicate the actions of the states. In Virginia, the General Assembly has already capped fees for small cell facilities at the extremely low rate of \$100 for the first five bundled applications and \$50 for each additional application. These low fees have so little relation to the real staff time and costs involved in conducting an adequate review that a locality cannot economically undertake to review applications at all, but merely rubber-stamp them. The NPRM/NOI seems to be thinking along the same lines.

The Virginia General Assembly has also imposed additional deadlines on localities for reviewing small cell facility applications to be installed on existing structures. These applications, which could include up to 35 unique permit requests, must be reviewed within 60 days, unless the locality requests an additional 30 days for review.⁵⁰ The locality must also

⁵⁰ See 2017 Va. Acts ch. 835.

provide notice of any application deficiencies within 10 days of filing or the application will be deemed complete. On top of these deadlines, Virginia localities must, of course, also comply with the Commission's deadlines for Spectrum Act review and the shot clock deadlines for first-time applications.

Imposing additional deadlines for other specifically defined classes of deployments will only add to the administrative burdens on staff. Further, the more specific the deadlines, the greater the potential for confusion. For example, if there are separate deadlines for review of DAS facilities and for review of facilities in residential districts, which deadline governs if an application proposes DAS facilities in a residential district? If the proposed DAS facilities also meet the size parameters of small-cell facilities in Virginia, staff must wrestle with the additional complication of determining whether the Commission's DAS deadlines trump Virginia's small-cell deadlines. By creating unnecessary confusion, the Commission's proposals would only add more delay and more friction to the review process.

V. The Commission should avoid intruding on the primacy of the courts.⁵¹

The NPRM/NOI raises again the notion that the phrase “[p]rohibit or have the effect of prohibiting” could be read to mean “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁵² As the County has observed, that is simply not what the words of the statute mean.⁵³ The

⁵¹ Virginia Joint Comments at 47.

⁵² NPRM/NOI at ¶ 90.

⁵³ Fairfax County Reply Comments at 7.

NPRM/NOI also seeks comment on whether it should take any action to “resolve” issues of statutory interpretation of this phrase under §§ 253(a) and 332(c)(7).

A. Whether a state or local government has prohibited the provision of service is a fact-based inquiry for the courts.

The “prohibition on service” provision in § 332(c)(7) provides that “the regulation of the placement, construction, and modification of personal wireless facilities by any state or local government or instrumentality thereof. . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” The question of whether a particular requirement constitutes a prohibition on the provision of service is fundamentally a fact-based determination that can only be handled effectively by individual adjudication.⁵⁴ Indeed, courts have more than 20 years of experience interpreting this phrase and do not require assistance from the Commission in performing their judicial function.⁵⁵

Although some Circuits have interpreted the phrase differently, there is no need for the Commission to step in and regulate a matter that courts are very capably handling.⁵⁶ On the contrary, it’s up to the Supreme Court to resolve any differences in approach among the Circuits, if it is so inclined, and not up to the Commission.

Likewise, § 253(a) of the Act is limited in scope to state and local government laws and regulations that actually or effectively prohibit an entity from providing telecommunications services. Under the standard analytical framework for § 253 cases, a “plaintiff suing a municipality under § 253(a) must show actual or effective prohibition, rather than the mere

⁵⁴ Virginia Joint Comments at 33.

⁵⁵ Virginia Joint Comments at 31.

⁵⁶ Virginia Joint Comments at 32.

possibility of a prohibition.”⁵⁷ No proper reading of the plain language of § 253 should result in a “preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services.”⁵⁸ Moreover, as the Virginia Joint Commenters have stated:

In the end, Congress meant for the Commission to have no rulemaking authority here because there is no gap to be filled by regulatory action: the questions at issue only arise in specific contexts, and the courts are the experts equipped to decide that kind of dispute. Providers do not need a regulatory gap in Section 253(c) to be filled by the Commission, because by excluding Section 253(c) from Section 53(d), Congress has allowed local governments to set the policy, not the FCC. If providers are aggrieved by the local policy decision, they have a remedy in court or with the local governing body.⁵⁹

In addition, any attempt to conflate § 253 with § 332 fails: the two sections serve different purposes, because (among other reasons) wireless carriers do not have the same kind of need to use public rights-of-way that wireline carriers do. They have numerous private-property alternatives.⁶⁰ With regard to the Commission’s inquiry,⁶¹ if a locality denies access to the right-of-way for wireless facilities in a manner that prohibits the provision of service, that would violate only § 332(c)(7) and not also § 253(a).⁶²

The NPRM/NOI also invites comment on whether the terms of a free-market contract between a government property owner, acting in its proprietary capacity, and someone who

⁵⁷ Virginia Joint Comments at 39 citing *Level 3 Commc’ns, LLC v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007), cert den. 557 U.S. 935 (2009).

⁵⁸ *Id.*

⁵⁹ Virginia Joint Comments at 44.

⁶⁰ Virginia Joint Comments at 45–47, 52–53, 58–60.

⁶¹ NPRM/NOI at ¶ 89.

⁶² The Commission has no authority to regulate the use of local public rights-of-way under § 253. *See* Virginia Joint Comments at 38–52, 63. *See generally* Comments of Smart Communities Siting Coalition at 51–69 (filed March 8, 2017); Comments of the National League of Cities, the National Association of Telecommunications Officers and Advisors, the National

wishes to use that property might somehow fall into the category of “other State or local legal requirement” as that phrase is used in § 253(a), including “charges for the use of rights of way.”⁶³ Section 253(d) clearly restrains any impulse the Commission might have to interfere in the free market by imposing price controls on such transactions. But even if it didn’t, the notion that compensation charged by local communities for use of their property could constitute a “barrier to entry” would lead to absurd or inconsistent results.

For example, if charging a reasonable fee for local government property were a barrier to entry, then the Commission’s charges to the winners of spectrum auctions would also constitute such a barrier—a much greater barrier, since wireless providers have many alternatives to the use of government property, but they cannot function without FCC-controlled spectrum. Yet the Commission seems to pride itself on getting a good price for spectrum, not abashed at “inhibiting” entry by charging a high price. In a similar way, any charges imposed by an ISP on edge providers for carrying their transmissions would “limit” the ability of competitors to compete. Any non-cost-based charges by providers to their retail customers could similarly be construed as inhibiting adoption. Such analogous cases would not be directly subject to § 253(a), which by its terms refers only to state and local governments. But the Commission would be inconsistent if it did not equally apply its other authority over such communications providers to remove such broadly interpreted “barriers.”

Association of Towns and Townships, the National Association of Counties, the National Association of Regional Councils, and the Government Finance Officers Association at 16–26 (filed March 8, 2017); Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle U. L. Rev. 475 (2003), available online at [Seattle U. L. Rev.](#)

⁶³ NPRM/NOI at ¶¶ 89-91.

B. County fees do not “prohibit or have the effect of prohibiting” service.

As discussed above, the Virginia General Assembly has already limited the amount localities may charge for small cell facility zoning permits: \$100 each for the first 5 small cell facilities on a permit application; \$50 for each additional facility up to a limit of 35 per application.⁶⁴ These nominal fees barely begin to cover a locality’s costs for processing the applications. The County has not historically charged any fee for 2232 review and approval of facilities. Starting on July 1, the County expects to begin charging a modest fee of \$1500 for new 2232 applications that require a public hearing.⁶⁵ This fee will apply to any new 2232 applicant, not just wireless facility applicants. “Feature Shown” and Spectrum Act applications will be subject to a \$750 or \$500 fee, respectively. Department of Planning and Zoning staff estimates that these fees represent a cost recovery rate of only one-half to two-thirds of the costs incurred in processing these applications.⁶⁶ Recovering some of the County’s costs should enable staff to even more efficiently process these applications.

Until last year, the County allowed monopolies to locate by right in all commercial and industrial zoning districts. When locating by right, providers were not required to pay any application or review fee. Due to Virginia legislation adopted in 2016, which precluded 2232 review of by right facilities, the County amended its ordinance to require a special exception for all monopolies in the County. That fee is \$16,375, which is *the same fee charged for almost all*

⁶⁴ See 2017 Va. Acts ch. 835, which will take effect as Virginia Code § 15.2-2316.4 on July 1, 2017.

⁶⁵ See Proposed Zoning Ordinance amendment at: <http://www.fairfaxcounty.gov/dpz/zoningordinance/proposed/publicfacilitiesandmodificationstoe xistingwirelesstowersorbasestations.pdf>.

⁶⁶ *Id.*

*special exception uses in the County.*⁶⁷ Due to the staff time, advertising costs, and other County resources required to process special exception applications, that fee allows the County to recover some of its costs as authorized by Virginia Code § 15.2-2286(A)(6).

The County charges annual rental fees to providers that are approved to install new wireless telecommunications structures (e.g., monopoles) on County-owned property. The rental fee continues as long as the facilities remain on County property. The County's annual rent for a monopole and associated equipment compound has averaged approximately \$24,000. This is not a cost-prohibitive charge and County staff is not aware of any provider ever deciding not to install its facilities due to that annual rent.

C. Courts must decide whether consideration of adverse visual impacts is part of the substantial evidence supporting a denial.

To the extent that “aesthetics” might include visual impacts, the Commission should be careful to avoid intruding on state land use law governing new structures. In Virginia, local governments are expressly authorized to regulate, restrict, permit, and prohibit the use of land and the size, height, area, bulk, location, and construction of structures. Va. Code §§ 15.2-2280(1), (2)). Under that authority, Fairfax County adopted Objective 43 of its Public Facilities Policy Plan—part of the Comprehensive Plan—which guides wireless applicants to avoid adverse visual impacts when designing and siting facilities. Objective 43(k), for example, directs applicants to “[d]emonstrate that the selected site for a new telecommunication facility provides the least visual impact on residential areas and the public way, as compared with alternate sites.”⁶⁸ Objective 43(l) guides applicants to mitigate visual impacts of facilities

⁶⁷ Zoning Ordinance § 18-106.

⁶⁸ See Policy Plan, Objective 43 at <http://www.fairfaxcounty.gov/dpz/comprehensiveplan/policyplan/pubfacilities.pdf>.

through landscaping, siting near mature trees, or increasing the height of an existing structure to avoid building a new one.⁶⁹ The Fairfax County Planning Commission and the Board of Supervisors consistently analyze proposed wireless facilities based on these and other similar policies and not on subjective aesthetic standards.

Section 332(c)(7) explicitly authorizes local governments to deny an application for a personal wireless facility if the denial is supported by substantial evidence in the written record. An applicant's failure to satisfy local regulations regarding adverse visual impacts has been recognized as part of the evidence supporting a denial.⁷⁰ Because the question of what constitutes an adverse visual impact is highly fact specific, the Commission should defer to courts as a check to ensure that denials are based on evidence of specific impacts and not generalized aesthetic concerns.

CONCLUSION

The Commission has neither the authority nor the solutions to warrant further rulemaking at this time. As Virginia and other states across the country enact legislation to accelerate wireless broadband infrastructure deployment, the Commission should see what works and what doesn't before rushing in (to the extent it even can) with an old solution unlikely to result in any meaningful acceleration of deployment. Restraint is critical, because Congress plainly created a judicial remedy in § 332, and the Commission must not intrude on the courts' authority. Thus,

⁶⁹ *Id.*

⁷⁰ *T-Mobile NE v. Fairfax Cty. Bd. of Supervisors*, 672 F.3d 259, 271 (4th Cir. 2012) (upholding the Board's denial as based on legitimate, traditional zoning principles that included consideration of the visual impact of the proposed facility); *New Cingular Wireless v. Fairfax Cty. Bd. of Supervisors*, 674 F.3d 270, 274 (4th Cir. 2012) (finding that characteristics of the facility, including its visual impact, did not satisfy the County's Comprehensive Plan or Zoning Ordinance requirements).

for all of these reasons, and for the reasons discussed by the Virginia Joint Commenters that the County incorporates herein,⁷¹ the Commission should refrain from rulemaking at this time.

Respectfully submitted,

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June 15, 2017

⁷¹ See Virginia Joint Comments, Exhibit 1.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

Streamlining Deployment of Small Cell Infrastructure)
by Improving Wireless Facilities Siting Policies;)
)

Mobilitie, LLC, Petition for Declaratory Ruling)
_____)

WT Docket No. 16-421

COMMENTS OF THE VIRGINIA JOINT COMMENTERS

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March 8, 2017

SUMMARY

The City of Alexandria, Virginia, and the Counties of Arlington, Fairfax and Henrico, Virginia (the “Virginia Joint Commenters,” or “Joint Commenters”) urge the Commission to recognize the limits to its authority and to close this proceeding without further action. The combination of advancing technology, market forces, and constituent desires for better wireless service have led to effective action at the state and local levels without the need for federal intervention.

The Virginia General Assembly has addressed the Commission’s concerns. In its 2017 session, the General Assembly enacted legislation dealing with the principal issues raised by the *Notice* with respect to small cell facilities. Senate Bill 1282 (“SB 1282”) addresses (i) the zoning of small cell facilities; (ii) access to the rights-of-way by wireless providers; (iii) access to rights-of-way managed by the state, for installation of small cells on existing structures; (iv) access to rights-of-way managed by localities, for installation of small cells on existing structures; (v) agreements for the use of public rights-of-way to construct new wireless support structures; and (vi) attachment of small cells to government-owned structures.

The Virginia Joint Commenters have developed practices that meet their needs while providing for the prompt approval of siting and installation requests. Henrico County has already developed specific procedures for accommodating small cell applications, and the City of Alexandria is close to reaching an agreement with Mobilitie that will allow that company to use its rights-of-way. None of the Joint Commenters imposes burdensome or unreasonable requirements. Under existing rules, zoning applications are routinely processed well within the Commission’s timelines and permits for work to be performed in the public rights-of-way are

issued in a matter of weeks. Of course, once SB 1282 takes effect on July 1, 2017, the Joint Commenters will comply with its requirements.

Furthermore, this proceeding is premature, in that both state and local governments have only recently begun to receive requests for small cell installations. Legislation similar to Virginia's SB 1282 has been introduced in other states, and there is every reason to believe other states will develop solutions suited to their own conditions.

Rather than eliminate local flexibility and indiscriminately preempt state authority, the Commission should recommend a set of best practices or exempt states that have adopted small cell legislation. The Commission could use the record of this proceeding as the basis for a set of recommended best practices for state and local governments. The other option — if the Commission feels compelled to adopt rules — is to exempt Virginia and other states that have adopted small cell regulatory statutes from the Commission's rules.

Further rule-making should be avoided because the Commission has reached the limits of its authority under 47 U.S.C. § 332(c)(7). In *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), the court upheld the Commission's authority to interpret the existing requirements of Section 332(c)(7), but noted that the agency had no power to impose additional limitations on local authority over wireless facility zoning. Furthermore, Section 332(c)(7) bans only actual prohibitions, and even under the broad leeway that the Supreme Court gave the Commission in affirming the Fifth Circuit's decision, there is no way to define a class of zoning or right-of-way management requirements as a complete prohibition in the absence of a specific application under a specific set of conditions.

Consequently, there is nothing for the Commission to interpret in this proceeding. Until a provider of wireless services can make a specific claim that it is prevented from providing

service, either through an outright ban, or a combination of requirements that actually prevent it from serving, no ban exists.

The Commission has no authority to regulate the terms of access to the rights-of-way under 47 U.S.C. § 253. In *City of Arlington, Texas, et al. v. FCC*, 133 S. Ct. 1863 (2013), *aff'g* 668 F.3d 229 (5th Cir. 2012), the Supreme Court held that when Congress draws a “clear line” in defining an agency’s authority, the agency cannot go beyond that line. Section 253(d) draws such a line, because it explicitly excludes Section 253(c) from the Commission’s preemptive authority. The Commission may determine whether a specific local requirement, as applied in a particular case, violates the ban on prohibitions on service in Section 253(a), but its general authority to interpret the statute does not extend to Section 253(a) because it is not possible to identify a general class of local requirements that could be considered a prohibition.

Congress also never intended for Section 253 to apply to wireless entities in the first place. The Communications Act clearly delineates between the rights of wireless providers in Section 332, and those of wireline providers in Section 253. This makes perfect sense, because wireless entities do not need access to the public rights-of-way to deliver their services: they have always been able to obtain antenna sites from the private real estate market, and there is no reason that they cannot continue to do that. This bifurcation also explains why the same language preempting prohibitions on service appears in both statutes: It needed to be in Section 332 to protect wireless carriers, and in Section 253 to protect wireline carriers.

Congress never contemplated the kind of regulation of fees and compensation for use of the rights-of-way proposed by Mobilitie. Section 253(c) preserves local authority to obtain compensation for use of the right-of-way. The Commission’s *Notice*, however, follows Mobilitie’s lead in conflating every type of fee or charge the company might ever face and

treating them all the same way. The Commission must not allow Mobilitie to confuse the issue and should recognize three critical points.

First, local charges for use of the rights-of-way (such as Alexandria's license fee) are in the nature of rent; therefore, it is not unusual or in any way inappropriate for them to be "recurring" charges, as Mobilitie calls them. Second, Mobilitie should expect to pay other fees that are operationally related to its use of the rights-of-way, such as traffic control and excavation fees. These charges arise only because of Mobilitie's desire to use the public rights-of-way and can be avoided or controlled by installing all or most of its facilities on private property. Third, zoning and building permit fees have nothing to do with Mobilitie's actual use of public rights-of-way because they address other policy concerns, and the Commission lacks the power to preempt them under Section 253 without highlighting how far the Commission's reading of the statute has wandered from Congressional intent.

Preemption of local access and compensation requirements would violate the Fifth Amendment. Mobilitie is looking for two things: the right to install physical facilities in public rights-of-way, and the right to use the rights-of-way at no charge. While it does not say so explicitly, Mobilitie seeks interpretations from the Commission allowing the company the same treatment as incumbent local exchange carriers, who typically occupy local rights-of-way at no charge under now-ancient grants. The Supreme Court, however, has ruled that a law that grants a right to enter and physically occupy the property of another without the property owner's consent triggers the takings clause of the Fifth Amendment. To meet Constitutional requirements, compensation must be based on fair market value. The Commission cannot provide for minimal compensation and claim to have met the Fifth Amendment's standard.

Finally, regulation of the terms of access would violate the economic principles underlying the Telecommunications Act of 1996. It is ironic that the Commission is considering regulation that would interfere with the thriving market for the use of private property as antenna sites while creating an implicit subsidy to the owners of wireless facilities. The principles underlying the 1996 Act called for the introduction of market forces into the telecommunications arena and the elimination of implicit subsidies. It would be the height of irony if the Commission relies on two statutes that were designed to eliminate local service monopolies to undermine the same economic principles that have so successfully transformed the wireless industry in a mere twenty years.

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COMMENTS OF THE VIRGINIA JOINT COMMENTERS

Introduction

The City of Alexandria, Virginia, and the Counties of Arlington, Fairfax, and Henrico, Virginia (the “Virginia Joint Commenters,” or “Joint Commenters”), respectfully submit these Comments in response to the Commission’s Public Notice dated December 22, 2016 (the “*Notice*”). The *Notice* was issued in response to a Petition for Declaratory Ruling filed by Mobilitie, LLC,¹ and solicits comment on two subject of great concern to the Joint Commenters: First, whether the Commission should further regulate the zoning of wireless facilities under 47 U.S.C. § 332(c)(7) (“Section 332(c)(7)”); and second, whether the Commission should construe 47 U.S.C. § 253 (“Section 253”) to extend its reach to include regulation of the terms of access to local government rights-of-way.

¹ Mobilitie, LLC, Petition for Declaratory Ruling (filed Nov. 15, 2016) (“*Mobilitie Petition*”).

The Virginia Joint Commenters urge the Commission to refrain from any further regulation in this area. While the Joint Commenters understand the Commission's desire to promote the deployment of anticipated 5G facilities, to the extent that the Commission has authority over small cell siting practices, this proceeding is premature. It would be unreasonable for the Commission to adopt a national regulatory scheme for a technology that is barely beginning to be deployed, without allowing state and local governments time to adapt. Nor is there any need for changes to existing rules governing the initial placement or collocation of standard wireless facilities. Furthermore, Section 253 of the Communications Act draws a clear line between local authority over rights-of-way and the Commission's authority to preempt actual barriers to entry to the telecommunications market.

I. WIRELESS SITING AND PUBLIC RIGHT-OF-WAY MANAGEMENT PRACTICES IN VIRGINIA.

With a combined population of over 1.8 million, the Virginia Joint Commenters comprise approximately 22% of the population of the Commonwealth of Virginia. Located in two of the three major population centers in the Commonwealth, with Hampton Roads being the third, the Joint Commenters are four of Virginia's twelve largest communities by population,² and represent some of the most desirable markets for wireless services in Virginia. Arlington and Alexandria are the two most densely-settled communities in the state. In addition, because of their combined size and locations, the wireless siting and rights-of-way management practices of the Joint Commenters are representative of the urbanized portions of the state.

² The estimated populations of the four Joint Commenters as of July 1, 2015, were:

Alexandria: 153,511; (2) Arlington County: 229,164; (3) Fairfax County: 1,142,234; and (4) Henrico County: 325,155.

United States Census Bureau, *American Factfinder*,
<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

All four jurisdictions have been contacted by Mobilitie with respect to the company's desire to place facilities in their rights-of-way. It is our understanding that when Mobilitie first approached the Joint Commenters, the company had not yet entered into a pole attachment agreement with Dominion Virginia Power, although an agreement is now in place. We remain unclear as to Mobilitie's arrangements with the four major wireless carriers.

At this point, only Henrico County has received formal applications from Mobilitie regarding the siting of specific facilities in the County. After discussions with the company, the County has agreed to allow Mobilitie to install small cell facilities on existing utility poles in the County's rights-of-way, without compensation or any kind of zoning process. Mobilitie is required to obtain a building permit only if it requires electrical service for its equipment and it must obtain a routine administrative permit authorizing work in the rights-of-way. Only if the company desires to install new support structures more than 50 feet tall will Mobilitie need to apply for special use permits.

As of the date of these Comments, Alexandria is nearing completion of a license agreement authorizing Mobilitie to use the City's rights-of-way for its business purposes.³ Although the proposed license agreement would grant Mobilitie the general right to operate anywhere in the City's rights-of-way, Mobilitie has informed the City that at this point it only intends to occupy a small number of utility poles in a small portion of the City. Individual right-of-way permits will still be required for work done in the rights-of-way, like every person engaged in such activities.⁴

³ We have also received reports that Mobilitie has applied to numerous other communities around the state.

⁴ See Parts I(B) and (C) for details regarding permit requirements.

In Arlington, Mobilitie has informed County staff of its desire to install facilities in at least 43 specific locations throughout the County, including a number of new monopoles or other support structures. Mobilitie has not submitted any formal applications.

Mobilitie representatives met with Fairfax County staff in the fall of 2016, but the company has not filed applications. As with all other Virginia counties, except Arlington and Henrico, Fairfax County's rights-of-way are managed by the Virginia Department of Transportation ("VDOT").

Mobilitie's plans have raised a number of practical concerns for the Joint Commenters, because they are responsible for preserving the quality of life for their residents, including the safety and appearance of the community. For example, this is not the first time a wireless entity has sought to use Arlington's streets to provide wireless service. In the 1990s, Metricom, Inc., installed roughly 100 to 150 wireless modems on utility poles and buildings throughout the County to deliver its "Ricochet" Internet access service. When the company declared bankruptcy in 2001, abandoned and unmaintained facilities were left on utility poles with nobody to turn to for their removal. Abandoned equipment is a safety hazard, takes up space on poles that might be useful for other purposes, causes inconvenience when other work is performed, and costs money to remove. There is no guarantee of Mobilitie's success, and it is local taxpayers who will suffer inconvenience and expense if Mobilitie's facilities ultimately have to be removed. Accordingly, Arlington County and the other Joint Commenters have ample reason to want to exercise their traditional functions without federal intervention.

In addition, none of the communities has had a specific process for handling the large numbers of siting requests Mobilitie and other small cell applicants apparently need, because the need has never arisen before. Mobilitie's rush to be the first to deploy its infrastructure and

facilities in such highly desirable markets is understandable, but must be balanced by other considerations. There is no need for the Commission to preempt local authority all over the country before local governments have had a chance to identify concerns and modify their own practices.

Local zoning, planning, and public works officials are professionals, tasked not only with managing public property, but also with balancing the administrative needs of government as an institution with the policy needs of government as a servant of the public. Local officials understand that “the public” means the full range of interests in the community, including individual residents, small local companies, and national firms with business operations in the community, such as Mobilitie and the wireless carriers.

Local elected officials are perfectly aware of the need to deploy wireless broadband, especially in sophisticated communities like the Alexandria, Arlington, Fairfax and Henrico: they hear it from residents and business leaders – their voters – all the time. For all these reasons, local governments can and do work with applicants to find ways to meet the needs of both the applicants and the community. Given time, each of the Joint Commenters is able and willing to develop smooth and efficient procedures that accommodate all the interests at stake.

Thus, notwithstanding the Commission’s concerns regarding the growth in siting applications, this entire proceeding is premature and takes the wrong tack. In an effort to help the Commission understand what is actually happening, we will begin with a description of the current siting practices used by the Joint Commenters and the new legislation that may affect current practices.⁵

⁵ Factual information regarding the zoning and right-of-way management procedures of each of the Joint Commenters, as summarized in this Part I, is derived from a questionnaire completed

A. The Virginia General Assembly Has Adopted Legislation Governing the Procedures for Placement of Small Cell Facilities.

In its 2017 session, the Virginia General Assembly enacted legislation that addresses the principal issues raised by the *Notice* with respect to small cell facilities. As of the date of filing of these Joint Comments, Senate Bill 1282 (“SB 1282”) has passed both houses, and Governor McAuliffe has said he will sign the bill. A copy is attached as Exhibit A. In addition, the Governor has the right to amend the bill, subject to later approval by a majority of each house of the legislature.⁶ For purposes of these comments, the Joint Commenters have assumed that the bill will be signed without amendment. Until the bill becomes effective, the procedures in Part I(B) continue to apply to all wireless facilities, including small cells.

SB 1282 addresses (i) the zoning of small cell facilities; (ii) access to the rights-of-way by wireless providers; (iii) access to rights-of-way managed by VDOT, for installation of small cells on existing structures; (iv) access to rights-of-way managed by localities, for installation of small cells on existing structures; (v) agreements for the use of public rights-of-way to construct new wireless support structures; and (vi) attachment of small cells to government-owned structures. A summary of the key terms of the statute follows.

1. New Va. Code Section 15.2-2316.4 [Zoning; small cell facilities]

Under this Code section, local governments can no longer require a variance, special use permit or special exception for any small cell facility, but may provide for administrative review

by staff members responsible for those functions, supplemented and clarified by questions from counsel.

⁶ VA. CONST., ART V, SEC. 6(b)(iii).

for the installation of small cells on existing structures. Under an entirely new approach, applicants may include up to 35 siting requests in a single application.

If the zoning department does not notify the applicant within ten days that the application is incomplete, it will be deemed complete. The locality must also approve or disapprove applications within 60 days of receipt of a complete application, and may then extend for another 30 days. An application will be deemed approved if it is not processed within the 60 plus 30 day time limit.

Applications may only be disapproved for four reasons: (1) interference with other communications facilities; (2) public safety or critical public service needs; (3) aesthetics and failure to obtain all required departmental approvals, if a small cell is to be attached on publicly owned or controlled property; or (4) conflict with a historical preservation ordinance or local charter provision. Aesthetic concerns related to installations on private property can be addressed only if the applicant voluntarily offers to do so.

Permit fees are limited to \$100 each for up to five facilities on a single application, and \$50 for each additional facility on the same application.

Finally, the locality has the authority to adopt rules governing removal of abandoned facilities.

2. New Va. Code Section 56-484.27 [Access to the public rights-of-way by wireless service providers]

Localities are now forbidden from imposing on wireless services providers or wireless infrastructure providers (whether they are installing or operating macrocells or small cells) any “unfair, unreasonable, or discriminatory” permitting, zoning, enforcement or inspection requirements.

3. New Va. Code Section 56-484.29 [Access to locality rights-of-way for installation and maintenance of small cells on existing structures]

Localities are authorized but not required to issue permits granting access to “all rights-of-way” for installing small cell equipment on existing structures. This section thus allows those jurisdictions that manage access to their right-of-way (cities and towns, as well as Arlington and Henrico Counties) a mechanism for granting such access.

If the local government does not notify the applicant within ten days that the application is incomplete, it will be deemed complete. The locality must also approve or disapprove applications within 60 days of receipt of a complete application, and may then extend its review for another 30 days. An application will be deemed approved if it is not processed within the 60 plus 30 day time limit.

Permit fees prohibited for the attachment or colocation of small cells, but the locality may charge a \$250 application processing fee. The locality may also require generally applicable zoning, subdivision, site plan, and comprehensive plan fees.

4. New Va. Code Section 56-484.30 [Agreements for use of public right-of-way to construct new wireless support structures; relocation]

This section preserves the existing authority of cities and towns to require an agreement or right-of-way permit authorizing the construction of wireless support structures within the public rights-of-way, subject to limitations on the length of agreements and the terms of any relocation provision.

5. New Va. Code Section 56-484.31: Attachment of small cell facilities to government-owned structures]

This section preserves the authority of Virginia localities to negotiate agreements for the attachment of small cell facilities to government-owned structures, subject to requirements

related to attachment rates, and make-ready work for access to poles. The rates charged and other terms and conditions must be “just and reasonable, cost-based, nondiscriminatory, and competitively neutral,” provided that rates for attachment to government-owned buildings may be based on fair market value, and charges for co-location on government-owned poles are limited to the locality’s costs.⁷

In closing, the Joint Commenters note that many questions remain about how these new requirements will work in practice. How difficult they will be to administer, whether the public interest will be adequately protected, and whether they promote deployment effectively all remain to be seen.

B. The Zoning Procedures Used by the Joint Commenters To Manage Macrocell Applications Are Prompt and Efficient.

Each of the Joint Commenters has zoning authority within its boundaries.⁸ Protecting the public health, safety and welfare, including preserving the aesthetics of the community and promoting economic development through the use of zoning is one of the principal functions of local government in Virginia. All four communities have adopted procedures for allowing

⁷ Incidentally, the definition of “co-locate” in SB 1282 is broader than the Commission’s. Proposed VIRGINIA CODE § 15.2-2316.3 would define “co-locate” to mean “to install, mount, maintain, modify, operate, or replace a wireless facility on, under, within, or adjacent to a base station, building, existing structure, utility pole, or wireless support structure.” As defined in 47 C.F.R. § 1.40001(b)(2), “collocation” means “the mounting or installation of transmission equipment on an eligible support structure”

⁸ VIRGINIA CODE ANN., Title 15.2, Ch. 22.

wireless providers to install their facilities, in accordance with state and local law and policy governing land use.⁹

Even before the Commission adopted its first shot clock requirement, the Virginia General Assembly had established timelines for local action on wireless siting requests. Under Va. Code §15.2-2232(F), a planning commission must act on an application for the siting of a “telecommunications facility” within 90 days, or it will be deemed approved. The governing body may extend the deadline by no more than 60 days, and the parties may mutually agree to further extensions, but if the applicant does not consent to an extension, the request will be

⁹ The four localities all have forms and instructions posted online for this purpose, which can be found here:

- City of Alexandria, Virginia, *Planning and Zoning FAQs*, <https://www.alexandriava.gov/planning/info/default.aspx?id=89956#Zoning> (last visited March 7, 2017); and City of Alexandria, Virginia, *Administrative Special Use Permits*, <https://www.alexandriava.gov/planning/info/default.aspx?id=18476> (last updated March 3, 2017);
- Arlington County, Virginia, *Building Arlington, Use Permits*, <https://building.arlingtonva.us/project/use-permits/> (last visited March 7, 2017);
- Fairfax County, Virginia, *Learn About Telecommunication Facility Reviews*, <http://www.fairfaxcounty.gov/dpz/2232/telecommunications.htm> (last visited March 7, 2017); and Fairfax County, Virginia, *Zoning & Development Review Process - Rezoning, Special Exception, Special Permit and Variance Applications*, <http://www.fairfaxcounty.gov/dpz/zoning/development/> (last visited March 7, 2017) and Fairfax County, Virginia, *Zoning Application Process - Application Packages/Individual Forms*, <http://www.fairfaxcounty.gov/dpz/zoning/applications/> (last visited March 7, 2017); and
- Henrico County, Virginia, *A Citizen’s Guide to Participating, Participating in Planning Commission Public Hearings*, <http://henrico.us/planning/citizens-guide-to-planning/> (last visited March 7, 2017) and Henrico County, Virginia, *Rezoning and Provisional Use Permit*, <http://henrico.us/services/planning-rezoning-and-provisional-use-permit/> (last visited March 7, 2017).

These forms have all been designed to provide local zoning staff with the information they need to ensure compliance with applicable statutes, ordinances, and regulations.

deemed granted. Until SB 1282 takes effect, this timeline applies to small cell applications as well as macrocells.

Unless an antenna or other wireless facility is to be located in a zoning district in which telecommunications facilities are permitted by right, a wireless provider or other person seeking to install such a facility is usually required to obtain a special use permit (also sometimes referred to as a special exception, telecommunications use permit or provisional use permit, depending on local practice).¹⁰ There are four basic circumstances and corresponding procedures that might apply to a zoning application for wireless facilities: (i) collocation on an existing building, pole, or other support structure; (ii) installation on an existing structure that is not already a wireless facility site; (iii) collocation that requires a substantial modification to an existing structure; and (iv) installation that will require construction of a new support structure.

1. Collocation. If an appropriate special use permit has already been issued for the planned site, the Joint Commenters routinely review zoning applications for macrocell facilities that can be collocated on an existing utility pole, antenna tower, or other structure through an administrative process that generally takes about 30 days. This includes rooftop installations and other installations on buildings.

2. Initial installation on an existing structure. If a special use permit is required and has not already been granted for an existing structure, such as a commercial building, a zoning application for a new macrocell facility to be placed on that structure will typically be processed within 90 days. In fact, Fairfax County does not even require a zoning permit in this case as long

¹⁰ Arlington County currently does not require zoning review of structures located in the public right-of-way. Antennas on existing utility poles in the rights-of-way therefore do not require special use permits.

as the installation complies with existing requirements set out in the County Zoning Ordinance.¹¹ The proposed facility is also subject to review under Va. Code § 15.2-2232.

3. Collocation requiring substantial modification. Substantial modifications of existing structures are treated in the same way as initial installations. For example, if a pole height is to increase significantly the application would go through a 90-day process, including a public hearing.

4. Construction of new support structure. Applications for macrocell installations that require new utility poles, monopoles, or other support structures typically require a new special use permit.¹² This process can take from 60 to 180 days, depending on the jurisdiction and the details of a specific application; the longer period only applies when requested or agreed to by the applicant. Otherwise, the Joint Commenters comply with the maximum period of 150 days permitted by state law. This is because, with the exception of Henrico and Arlington, the construction and installation of new facilities requires a comprehensive plan review in addition to a zoning action (the grant of a special use permit). Such reviews, however, are usually conducted simultaneously with the zoning procedure

During the review process for special use permits, local zoning staff conduct research and obtain agency comment¹³ in order to: (1) understand how the application satisfies Zoning

¹¹ Fairfax County Zoning Ordinance § 2-514.

¹² In Henrico, support structures less than fifty feet in height do not require a special use permit.

¹³ In Fairfax County, for example, during this period the application is reviewed concurrently by agencies and departments – chiefly Fairfax County offices – and comments are provided to the project coordinator. As appropriate, agency or department reviews include the Fairfax Department of Transportation, Virginia Department of Transportation, Fairfax County’s Urban Forestry, Land Development Services, Environmental Planning, Zoning, Historic and Cultural Resources, Park Authority, and Planning Department.

Ordinance/Comprehensive Plan criteria; (2) evaluate the potential visual effects and generator noise of the proposed facility, especially in heavily residential areas; (3) work with the applicant on structure and ground compound design to limit visual and noise effects; (4) attend balloon flies and community meetings, if those events are requested by a planning commissioner; and (5) draft a staff report¹⁴ which summarizes any issues with the application, the status of the case, and any staff recommendations. The application will then be heard by the planning commission. After the planning commission conducts the public hearing, staff will continue to work with an applicant to resolve any remaining issues; in some jurisdictions,¹⁵ staff will then draft a report for the governing body, similar to the one prepared for the planning commission. The governing body then votes to approve or deny the application.¹⁶

Most applications are approved without discussion. In Arlington, for example, particularly in the case of special use permit applications for existing structures, these applications are typically placed on the County Board's consent agenda and approved by unanimous consent, unless a member of the public or a Board member requests discussion of the item.

The application procedures for special use permits are designed to be as efficient as possible for both the applicant and the local government, while at the same time ensuring that the public interest is properly protected. Each of the Joint Commenters has posted information online to assist applicants in determining (i) whether a permit is necessary; (ii) if so, what type of

¹⁴ Arlington County does not require this step.

¹⁵ Fairfax County does not require a second report.

¹⁶ In Alexandria, a public hearing is required; such hearings are held each month.

permit; and (iii) what information and documents must accompany an application.¹⁷ In many cases, staff members tasked with receiving a zoning permit application will check the application for facial completeness at the time of submittal, and inform the applicant on the spot if any required document or information has not been included.

Zoning permit applications are rarely denied. In Arlington County, during 2015 and 2016, the County Board approved twenty-two special use permit applications (both new and revised; none were denied. In Henrico County, there have been thirty-eight applications requiring special use permits since 2006. Twenty-five of these applications were for new structures and

¹⁷ See the following:

- Arlington County, Virginia, *Building Arlington, Use Permits*, <https://building.arlingtonva.us/project/use-permits/> (last visited March 7, 2017)
- Henrico County, Virginia, *A Citizen's Guide to Participating, Participating in Planning Commission Public Hearings*, <http://henrico.us/planning/citizens-guide-to-planning/> (last visited March 7, 2017) and Henrico County, Virginia, *Rezoning and Provisional Use Permit*, <http://henrico.us/services/planning-rezoning-and-provisional-use-permit/> (last visited March 7, 2017)
- City of Alexandria, Virginia, *Planning and Zoning FAQs*, <https://www.alexandriava.gov/planning/info/default.aspx?id=89956#Zoning> (last visited March 7, 2017) and City of Alexandria, Virginia, *Administrative Special Use Permits*, <https://www.alexandriava.gov/planning/info/default.aspx?id=18476> (last updated March 3, 2017)
- Fairfax County, Virginia, *Learn About Telecommunication Facility Reviews*, <http://www.fairfaxcounty.gov/dpz/2232/telecommunications.htm> (last visited March 7, 2017), Fairfax County, Virginia, *Zoning & Development Review Process - Rezoning, Special Exception, Special Permit and Variance Applications*, <http://www.fairfaxcounty.gov/dpz/zoning/development/> (last visited March 7, 2017), and Fairfax County, Virginia, *Zoning Application Process - Application Packages/Individual Forms*, <http://www.fairfaxcounty.gov/dpz/zoning/applications/> (last visited March 7, 2017).

thirteen for collocations or height extensions. Of those thirty-eight, one new structure application was denied and six were withdrawn by the applicant. Rooftop installations in Henrico are handled by building permit, and there are so many that the Planning Department has lost track of the number. In Fairfax County, only approximately six applications have ever been denied by the Planning Commission, Board of Supervisors, or Board of Zoning Appeals, and there are currently approximately 125 approved monopoles and towers in the County, as well as well over 1,000 located on other structures. Alexandria has not received an application for a free-standing tower or monopole in many years. Staff is not aware of any applications, including those for rooftop sites, that have been denied.

Those few applications that have been denied have generally been rejected because of the aesthetic or visual effects on adjoining residential property owners or historic properties, or for failure to substantially conform to the master plan of the locality. For example, zoning approval for installation on poles or other free-standing structures could be rejected for such things as location, massing, scale, height,¹⁸ and other physical features. Building-mounted installations may be rejected if their general design or proposed screening is architecturally incompatible, but applicants almost always make adjustments to the design that satisfy the locality's concerns.

C. The Joint Commenters Use Generally Applicable Permitting and Licensing Procedures To Manage the Public Rights-of-Way.

As we discuss further in our analysis of Mobilitie's request for regulation of local fees and compensation in Part IV below, Mobilitie's Petition and the FCC's *Notice* seem to conflate

¹⁸ For example, in Arlington an application may be denied if the proposed installation does not meet co-location height parameters in the Arlington Zoning Ordinance, which provides that height increases may only be permitted if they are no more than the greater of 20' or 25% of existing structure height.

four distinct concepts: (i) the grant of general authority to use the public rights-of-way on a long-term basis in connection with the conduct of the grantee's business, which typically takes the form of a license agreement or franchise; (ii) permission to enter the rights-of-way to perform construction work that requires excavation in the rights-of-way, such as burying cable or installing a utility pole, which typically takes the form of a permit (referred to in these Comments as an "excavation permit"); (iii) permission to enter the right-of-way on a temporary basis to conduct work that does not require excavation, such as hanging cables on an existing pole, which requires what we will call a "traffic control permit;" and (iv) local government responsibility to ensure the structural and electrical safety of certain facilities.

In Virginia, rights-of-way management is largely a state function. Cities and towns and two counties – Arlington and Henrico – manage their own rights-of-way. VDOT is responsible for construction, maintenance, and management of all other public roads and highways in the Commonwealth, including almost all of those in Fairfax County.

Consequently, the City of Alexandria is the only one of the Joint Commenters that grants telecommunications providers general authority to use the rights-of-way in the form of a license or franchise agreement. Alexandria and Arlington manage their rights-of-way by requiring both excavation permits and traffic control permits. Henrico County issues a single type of right-of-way-permit for both traffic control and excavation projects. Fairfax County does not issue either type of permit, but wireless providers engaged in activities in the rights-of-way in Fairfax County must comply with VDOT requirements.

The Joint Commenters apply the same permitting procedures to wireless telecommunications providers that they apply to other users of the public rights-of-way. Those procedures vary somewhat, depending on whether the applicant seeks to install facilities on

existing poles or structures within the public rights-of-way (which may not require excavation) or the applicant wishes to construct new support structures in the rights-of-way.

The Joint Commenters generally employ an administrative process for reviewing applications for traffic control permits, which are primarily concerned with traffic safety. This is the process that would apply to a wireless provider seeking to install its facilities on an existing pole or structure, without any excavation. The application process for excavation permits is more complicated because excavation and installation of new support structures generally raise engineering and safety issues that do not arise for traffic control permits. While the review process is similar to the process used for a traffic control permit, the additional complexity of the proposed work adds to the information and time needed to process an excavation permit application.

Currently, the Joint Commenters do not distinguish between macrocell facilities and DAS or small cell facilities for permitting purposes. This may change after the new Virginia legislation takes effect, but all four localities are only beginning to evaluate how the legislation may affect their current procedures.

Complete applications for right-of-way permits are rarely denied,¹⁹ because local government staff will work with applicants to find acceptable alternatives or solutions when an application might be denied as initially filed. For example, if an application is submitted in Arlington which proposes work to be performed that conflicts with existing County infrastructure or fails to meet minimum clearances from existing County infrastructure, the County will work with the applicant to revise the plans and application to avoid the conflict or

¹⁹ An application that fails to provide proof of authority to use the poles or structures or, in the case of Alexandria, fails to include a right-of-way use agreement, would be deemed incomplete.

meet the clearance requirements. The same is true for applications which would conflict with or negatively affect an impending County capital improvement project.

1. Applications for Traffic Control Permits.

The time frame for processing an application for a traffic control permit from the filing of a complete application to the approval (or, rarely, denial) of the complete application, generally ranges from three to ten business days.²⁰ Such applications are processed in the same fashion regardless of whether the applicant is a wireless provider, or a non-wireless telecommunications provider. In fact, for Alexandria, Arlington, and Henrico, the process is the same for all applicants seeking to perform work in the County's public rights-of-way; all applicants, regardless of the nature of their business, are treated in the same fashion. The processing time is dictated not by the purpose of the particular work but rather by the scope of the work and the effect the work will have on the public rights-of-way, local government infrastructure, and proposed capital improvement projects.²¹

The procedures used by the Joint Commenters to process traffic control permits are designed to be as efficient as possible for both the applicant and local staff, while at the same time ensuring that members of the public and public property are protected from harm. As with zoning applications, the Joint Commenters have no interest in slowing down the process. Each of the localities has prepared information that assists applicants by setting out the information

²⁰ In Alexandria, average review time is five business days. In Arlington, review times range from five to ten business days but average around seven business days.

²¹ Although the Joint Commenters are only beginning to receive applications for permits related to the placement of small cells, the Joint Commenters anticipate that, to the extent that their existing process is consistent with state law, the same process and time frames would apply.

and documents that must accompany a permit application. This material is available to the public, both on each jurisdiction's website and in paper format.²²

Despite these efforts, it is not unusual for applicants to submit incomplete applications. In a further effort to expedite the process, staff members responsible for receiving permit applications often check them for facial completeness at the time of submittal and inform the applicant, on the spot, if any required documents or information are missing. They do this because rejecting an application for incompleteness benefits nobody, since staff will simply have to deal with the applicant again. Whether applicants appreciate it or not, the point of the permit process is to protect the public interest, and permit requirements and application procedures exist to comply with the law and to prevent past problems from recurring.

²² See the following:

- Arlington County, Virginia, *Public Right-of-Way Permit Guide*, <https://topics.arlingtonva.us/permits-licenses/public-right-way-permit-guide/> (last visited March 7, 2017);
- City of Alexandria, Virginia, *Permit Center*, <https://www.alexandriava.gov/PermitCenter> (last updated January 5, 2017);
- City of Alexandria, Virginia, *T&ES Permits*, <https://www.alexandriava.gov/tes/info/default.aspx?id=3456> (last updated June 24, 2016);
- Henrico County, Virginia, *PERMIT TO WORK IN RIGHT-OF-WAY, Special Provision for Work in County Right-of-Way*, <http://henrico.us/assets/rightofwayform1.pdf> (last updated July 23, 2015),
- Virginia Department of Transportation, *Land Use Permit Regulations Guidance Manual*, http://www.virginiadot.org/business/resources/Land_Use_Permits_Regulations_2011/Land_Use_Permits_Regulations_Guidance_Manual.pdf (last updated May 20, 2013)
- Virginia Department of Transportation, *Land Use Permits*, <http://www.virginiadot.org/business/bu-landUsePermits.asp> (last updated February 28, 2017)
- Virginia Department of Transportation, *Guidelines for Fiber Optic Cables Permits, NOVA District (Fairfax) Permits*, <http://www.virginiadot.org/business/resources/fairfaxpermitsfiberopticguidelines.pdf> (last updated March 2004).

Some Joint Commenters even have on hand certain standard documents which have frequently been omitted by applicants and which the employee can provide to an applicant who walks in with an incomplete application. In Arlington, for example, a request for a traffic control permit must include a maintenance of traffic (“MOT”) plan that accords with the Federal Highway Administration’s *Manual on Uniform Traffic Control Devices* or the Virginia Department of Transportation’s *Virginia Work Area Protection Manual*. If an applicant seeks to file without an MOT plan, County staff will suggest that the applicant use one of several standard plans that staff keep on hand so that applicants do not have to leave and then return after preparing their own plans.²³

Applicants for traffic control permits are required to provide the respective local government agency with information detailing the scope of the work to be performed, the identity of the contractor performing the work, and the effect that the project will have on the rights-of-way, with the effect on traffic flow being of particular concern. This information must be detailed enough to permit staff to determine whether and to what extent the public and neighboring property owners will be affected. If the information is inadequate, staff will notify the applicant as soon as practicable and work with the applicant to ensure that adequate information is supplied. All of the Joint Commenters also require that an applicant seeking to install facilities on an existing pole or structure within the rights-of-way represent or otherwise provide proof that it has the owner’s permission to attach facilities to the pole or other structure.

²³ Whether this “standard plan” would be sufficient would depend on a variety of factors including the actual location of the traffic to be affected, as well as the scope of the impediment, for example, the need to close one of several lanes of traffic or an entire street.

2. Applications for Excavation Permits.²⁴

The time frame for processing an excavation permit, from the filing of a complete application to the issuance of a permit, is generally not more than thirty days, and usually less.²⁵ As with traffic control permits, applications for excavation permits are processed in the same way, regardless of whether the applicant is a wireless company, a wireline telecommunications provider, or another type of entity altogether. Other than the time frame for approval and the specific information required of the applicant, the discussion above regarding traffic control permits applies to excavation permits as well.²⁶ The Joint Commenters have no interest in slowing down the approval process, and the same procedures apply, including the availability of online permit information, and the policy of assisting applicants by making the process as smooth and straightforward as possible.

Complete applications for permits are rarely denied, because local government staff is directed to work with applicants to find acceptable alternatives or solutions even if an application as initially filed might be subject to denial.

3. License Agreements.

The Virginia Constitution expressly requires telephone companies and “like enterprises” to have the consent of the governing body before they use the rights-of-way of any city or

²⁴ Note that Arlington has an additional class of excavation permit that applies to large-scale earth removal, such as digging for the foundation of a multi-story building. These do not apply to the kinds of structures under discussion issue here.

²⁵ In Arlington the maximum time for action on a complete application is 30 days. In Henrico the time frame is three weeks.

²⁶ In Arlington, all excavation permits also require a traffic control permit.

town.²⁷ The Constitution and related statutes also prescribe detailed procedures for granting any person the right to use public property for a period of more than five years.²⁸ Accordingly, the general practice in the City of Alexandria is to enter into license agreements with telecommunications providers for periods of up to five years. These agreements grant the right to use the City's rights-of-way, as required by the Constitution. The City currently has license agreements in place with approximately ten telecommunications providers. The average time for negotiation and approval of these agreement is four to six months.

4. Building Permit Requirements.

Building permits are generally applicable requirements, required by all communities to ensure compliance with local construction and safety code requirements. They have nothing to do with zoning, access to the rights-of-way, or the use of public property. Nevertheless, they can apply to telecommunications facilities. Henrico County requires a building permit for small cell installations in the rights-of-way that require an electric service connection. This is in effect a safety inspection fee.

D. A Summary of the Fees Assessed by the Joint Commenters in Connection with the Placement of Wireless Facilities.

A telecommunications provider in Virginia may be subject to one or more of the following taxes and fees:

²⁷ VA. CONST., ART VII, SEC. 8; *see also* Va. Code § 56-458.

²⁸ VA. CONST., ART VII, SEC. 9; these procedures have been clarified in VA. CODE §§ 15.2-2101 through 2105.

1. Virginia Communications Tax.

The General Assembly has adopted a statewide communications tax of 5% of gross revenues to replace cable franchise fees and certain other taxes and fees.²⁹ This fee is paid to the state by all providers of “communications services,” and distributed to localities under a formula determined by the state Tax Commissioner. Given the questions about Mobilitie’s precise regulatory status and the nature of its activities, as discussed in Part III(D), it is not clear to the Joint Commenters whether Mobilitie would be required to collect and remit the tax.

2. Public Rights-of-Way Use Fee.

The legislature adopted the public right-of-way use fee expressly for the purpose of compensating localities for the use of their rights-of-way, and to replace most permit fees.³⁰ This fee only applies to entities that have “access lines” in a jurisdiction; consequently, an entity like Mobilitie that does not serve individual customers is not subject to the fee. In addition, the fee does not apply in localities that have not adopted an implementing ordinance. For example, Henrico County has not adopted such an ordinance. The amount of the fee is calculated annually by dividing the number of highway miles in the Commonwealth by the number of access lines in the state, provided that it can never be less than \$0.50 per subscriber per month.

3. Telecommunications License Fee.

Cities and towns that have not adopted the public rights-of-way use fee retain the right to obtain agreed-upon compensation for the use of their rights-of-way by telecommunications providers. Cities and towns may also negotiate for compensation from telecommunications providers and other entities that are not subject to the public rights-of-way use fee. For this

²⁹ VA. CODE § 58.1-648.

³⁰ VA. CODE § 56-468.1.

reason, Alexandria charges various entities that have installed fiber optic cable in the City's streets an annual license fee, in accordance with the terms of its license agreements with those entities. In principle, the fee is negotiable, but in practice all of the licensees pay a standard rate of \$6.00 per foot per year.

4. Zoning Permit Application Fee.

In Alexandria, the fee for a special use permit that does not require a public hearing and City Council approval is \$325. If a public hearing is required, as in the case of a new support structure, the fee is \$575. Arlington charges similar fees. In Fairfax County, the fee for the equivalent type of permit is \$1,600; the County requires no fee for other types of applications. For a tower over fifty feet in height in Henrico, the application fee for a special use permit is \$750.

5. Small Cell Zoning Permit Application Fee.

Under SB 1282, permit fees are limited to \$100 each for up to five facilities on a single application, and \$50 for each additional facility on the same application. The locality may also require generally applicable zoning, subdivision, site plan, and comprehensive plan fees.

6. Small Cell Rights-of-Way Access Permit Application Fee.

SB 1282 prohibits permit fees for the attachment or colocation of small cells, but the locality may charge a \$250 application processing fee.

7. Traffic Control Permit Application Fee.

These fees vary depending on the exact nature and scope of the planned activity. For example, the fee for a permit authorizing the closing of a traffic lane will depend on the number of feet to be closed, and the classification of the affected road. In Arlington, the base fee is \$40, plus \$4 for each additional day, plus the footage fee; a permit allowing the closing of one lane of

an arterial roadway for two days would total \$104.³¹ Henrico charges a nominal fee of five dollars.

8. Excavation Permit Application Fee.

These fees also vary depending with the nature and scope of the planned activity. In Alexandria, the fee for excavating is \$250 per block, but other charges may apply depending on the nature of the project. In Arlington, the base fee is \$155, plus additional amounts for specific activities; the charge for a permit for installing a new pole would be the base fee, plus an additional \$225.³²

³¹ See the following:

- Arlington County, Virginia, *Transportation Right-of-Way Fee Schedule*, <https://topics.arlingtonva.us/permits-licenses/transportation-right-way-permit-guide/transportation-right-way-fee-schedule/> (last visited March 7, 2017);
- Henrico County, Virginia, *Permit Fees*, <http://henrico.us/works/permit-fees/> (last visited March 7, 2017); and
- City of Alexandria, Virginia, *Fee Schedule FY2016, Permit Fee Information*, <https://www.alexandriava.gov/uploadedFiles/tes/info/fee%20schedule%20FY2016.pdf> (last updated July 15, 2015).

³² See the following:

- Arlington County, Virginia, *Arlington County Code, Chapter 22, Street Development and Construction, §22-7(C) Charges*, <https://arlingtonva.s3.dualstack.us-east-1.amazonaws.com/wp-content/uploads/sites/22/2016/04/Chapter-22-STREET-DEVELOPMENT-AND-CONSTRUCTION.pdf> (last visited March 7, 2017);
- City of Alexandria, Virginia, *Fee Schedule FY2016, Permit Fee Information*, <https://www.alexandriava.gov/uploadedFiles/tes/info/fee%20schedule%20FY2016.pdf> (last updated July 15, 2015); and
- Henrico County, Virginia, *Permit Fees*, <http://henrico.us/works/permit-fees/> (last visited March 7, 2017).

9. License Fee or Rent for Attachment to Government-Owned Structure.

Under SB 1282, localities may charge a fair market rate for the use of their property, except for utility poles, which are subject to cost-based rules.

10. Building Permit Fee.

Building permits and the associated fees fall entirely outside the scope of the *Notice*. As noted above, Mobilitie has agreed to pay them in Henrico County, where the fee is based on the cost of construction, plus a state levy of two percent of the permit fee. Building permit fees in Arlington and Alexandria are calculated in a similar fashion.

II. FURTHER RESTRICTION OF LOCAL ZONING AUTHORITY UNDER SECTION 332 OF THE COMMUNICATIONS ACT IS UNNECESSARY.

The Joint Commenters do not question the Commission's authority under *City of Arlington, Texas, et al. v. FCC*, 133 S. Ct. 1863 (2013) ("*City of Arlington*"), *aff'g* 668 F.3d 229 (5th Cir. 2012), to establish timelines for local government action on zoning applications for the siting of wireless facilities.³³ We do not, however, concede that the Commission has the power

³³ In *Petition for Declaratory Ruling To Clarify Provisions of Section 332(c)(7) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-2165, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (the "*2009 Declaratory Ruling*"), the Commission applied its general rulemaking authority under 47 U.S.C. § 201(b) to interpret certain terms of 47 U.S.C. § 332(c)(7)(B), even though 47 U.S.C. § 332(c)(7)(A) states that "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless facilities." The Commission then proceeded to establish what it deemed reasonable timeframes for local action in such cases, asserting the authority to determine the meaning of "reasonable period of time," as used in 47 U.S.C. § 332(c)(7)(B)(ii). The City of Arlington, Texas, sought review of the Commission's ruling, arguing that the Commission had exceeded the authority granted by Congress. The Fifth Circuit upheld the *2009 Declaratory Ruling*, and the Supreme Court affirmed, holding that under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an agency

to go any further than it did in the *2009 Declaratory Ruling*, such as by attempting to define what constitutes unreasonable discrimination or to further clarify the meaning of “prohibition” under 47 U.S.C. 332(c)(7)(B). Furthermore, no such action is necessary. The current shot clock deadlines established by the *2009 Declaratory Ruling* and the *2014 Collocation Order*³⁴ function perfectly well, and the courts have been resolving disputes in accordance with congressional policy for twenty years.

A. The Current Shot Clock Deadlines Under the FCC’s 2009 Declaratory Ruling, the 2014 Collocation Order, and Virginia Law Are Adequate.

There is no reason for changing any existing procedures or timelines related to standard wireless facility installations; to be more precise, there is no reason for shortening the timelines in either the *2009 Declaratory Ruling* or the *2014 Collocation Order*. In fact, the case for regulation of antenna siting under the *2009 Declaratory Ruling* was always weak. Although the courts have upheld the Commission’s decisions, those cases did not examine the underlying facts closely, because the courts were required to defer to the Commission’s judgment under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”). Federal intervention was never justified because in 2009 mobile wireless service was being rolled out on a nationwide basis with large-scale local cooperation, as it is today.

We assume that the Commission has asked general questions in the *Notice* about the existing rules because it is natural to raise the subject in light of the nature of the proceeding. Even so, it has only been two years since the adoption of the collocation shot clock under the

is permitted to determine the scope of its own authority unless Congress has drawn a clear line to limit that authority.

³⁴ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014) (the “*2014 Collocation Order*”).

2014 Collocation Order, so there is no need to revisit those procedures at all. The *2009 Declaratory Ruling* took care of the Commission's chief concern in 2009, which was that the zoning approval process took too long. Further intervention runs the risk that the Commission will substitute its judgment for state law on substantive zoning matters, rather than just processing deadlines, which Congress never intended.³⁵ As outlined in Part I(B), Virginia localities are not only meeting the Commission's various timelines, but working to expedite the applicable permitting processes.

Nor is action required on small cell installations. The existing practices of the Joint Commenters have placed no great burdens on small cell installations, and the vast majority of siting requests are promptly granted, as described in Part I. In any case, despite the lack of evidence that existing requirements have been slowing the process down, the General Assembly has addressed the matter. Other state legislatures will undoubtedly do the same, in a fashion that is compatible with the laws, practices, and needs of each state. Even where states do not act, local governments will adapt their processes to suit local conditions.

In fact, the wireless industry would never have been able to achieve national coverage for four large carriers in less than twenty years without the cooperation of local governments. The procedures established by Congress in Section 332(c)(7) work perfectly well on a case-by-case basis, and when disputes are not resolved at the administrative level, the courts are perfectly capable of handling them. Were it not for the fact that the wireless industry has the ear of the Commission, this proceeding would be unnecessary.

³⁵ Although the *2009 Declaratory Ruling* took a step beyond simply adopting "reasonable" time frames for local action by also ruling that to deny an application based on the presence of a single carrier in a market is a prohibition, the Commission was also careful to distinguish that decision from its reluctance not to preempt blanket variance requirements. As we discuss further below, the Commission was right to be cautious.

It is hard to believe that applying the same timelines to small cells and macrocells has been particularly burdensome for carriers. Furthermore, while there might be benefits to a second form of process for multiple siting requests submitted as a batch, the Commission is not an expert on local permitting, any more than local governments are qualified to manage spectrum licensing. Those kinds of procedures are best developed at the local level, in response to local conditions. Any role for the Commission ought to be limited to recommending best practices, as we propose below in Part VI.

In any event, even before the passage of SB 1282 the Joint Commenters have been handling small cell zoning applications by administrative review with little or no delay. State law already requires action on all siting requests, including those for small cells, within 90 days, plus no more than an additional 60 days.³⁶ Under the new Virginia law, the Joint Commenters will now be required to act in 60 days, plus an additional 30. We feel certain that Mobilitie and other wireless providers will agree that this timeframe is adequate for small cell applications, because industry lobbyists were actively engaged in the legislative process, and consented to the legislation before it was enacted. Consequently, the *Notice* should be treated as moot as far as small cell installations in Virginia are concerned.³⁷

Virginia jurisdictions will now also be required to accept batch applications for up to 35 small cell sites, and process them within the same 60-day plus 30-day time frame. This could pose significant practical problems, and it remains to be seen whether communities can effectively manage applications within that period. The Joint Commenters believe that a more

³⁶ VA. CODE ANN §15.2-2232(F).

³⁷ We understand that similar legislation has been introduced recently in Colorado, Florida, Michigan, Texas, Washington, and other states.

reasonable regulatory scheme would acknowledge that reviewing 35 requests is likely to take longer than just one, even if the individual items of equipment are smaller or pose fewer concerns. The General Assembly may have inadvertently raised significant questions about how local governments are now supposed to address relatively simple but still important matters. For example, each of the 35 sites in a batch application will still require a traffic plan. Rather than jumping in to adopt a single national time frame, the Commission might consider waiting to see what other states do. This would also allow local communities time to identify what works and what does not.

B. Instead of Concentrating on How It Can Force New Requirements on Local Governments, the Commission Should Consider Other Aspects of the Problem: What Can the Wireless Industry Do Differently?

Further Commission regulation of macrocell facilities would need to be based on a contradictory proposition: the current shot clock rules are not working, and therefore, the Commission must impose more shot clock rules. As we have noted earlier, the *2009 Declaratory Ruling* was designed to address the chief problem identified by the Commission, which was the time needed to get applications approved. Setting aside what timeframes are reasonable for small cells, since Virginia has already acted on those, the question becomes whether anything has changed regarding macrocells that demands action. If the Commission's shot clock was reasonable in 2009 as a response to allegedly over-long local procedures, it's still reasonable today.

The *Notice* suggests that at least in some communities there is a backlog of applications. But that does not mean that there is a problem with local procedures. It could just mean that carriers are submitting many more siting requests; if that is the case, how does it serve the public interest to force local governments to cut back further on their review procedures?

One thing the *Notice* does not suggest is an examination of carrier practices that contribute to delays. In fact, regulating local governments without imposing obligations on the wireless carriers may be counterproductive. The carriers and their contractors and agents know that localities are under strict timelines to request additional information and to process applications. This creates an incentive to submit incomplete or sloppy applications, because there is no clear cost to the applicant – the burden is on the locality to meet the deadline. Consequently, we urge the Commission to look at the other side of the coin, and ask questions designed to elicit information about how carriers can respond more effectively to local needs.

There is another area in which the Commission has not acted and where only the Commission has statutory authority. Fairfax County reports that close to half of the complaints received by its office of consumer affairs regarding telecommunications and cable matters have to do with concerns over radio frequency emissions. While those complaints are not taken into account in wireless zoning decisions, addressing residents' concerns does take up considerable staff time at the local level. Yet the Commission has not updated its rules on RF emissions significantly since 1996. Commission action in that area would leave local government staff more time to devote to the kinds of issues that concern the Commission in this proceeding.

There are undoubtedly other aspects of the problem that the Commission could consider, beyond simply placing additional burdens on local governments.

C. The Courts Have More Than Twenty Years of Experience With Interpreting the Phrase “Prohibit or Have the Effect of Prohibiting” in Particular Factual Contexts.

The *Notice* observes that the Commission has not attempted to define the statutory phrase “prohibit or have the effect of prohibiting,” as used in Section 332(c)(7), except for the case in

which an application is denied on the ground that there is already one carrier in the market.³⁸ On the other hand, even as the courts have resolved numerous cases in which that phrase was at issue, the wireless industry has deployed its infrastructure very successfully over the past twenty years, by any objective measure. In light of that, it seems unnecessary for the Commission to consider the question now.

The FCC already addressed the phrase in a narrow context in the *2009 Declaratory Ruling*, when it considered whether a local practice of denying a siting request based on the presence of a single carrier in a market should be preempted under Section 332(c)(7)(B)(i)(II). The Fifth Circuit affirmed the Commission's authority to do so in *City of Arlington, Texas, et al. v. FCC*, 668 F.3d 229 (5th Cir. 2012). But even so, as the Commission implicitly acknowledged in 2009,³⁹ the courts are entirely capable of handling these matters. The FCC has no need to step in and regulate when the judicial system is perfectly capable of resolving disputes. Regulatory agencies should not interpose themselves on every question, because that kind of top-down, centralized directive undermines state and local priorities and democratic governance. The shot clock orders have addressed the principal federal policy concern that has arisen since Section 332(c)(7) was enacted; the courts and the affected parties should be left free to resolve disputes on other questions just as they have been.

Furthermore, as discussed in more detail in Part III, the best reading of the statute is that only actual prohibitions or effective prohibitions are preempted. Hypothetical prohibitions, cases

³⁸ *Notice* at 10.

³⁹ *2009 Declaratory Ruling* at para. 57.

in which a provider asserts that an entire ordinance or a specific requirement might be so onerous that the company could never serve the community, do not meet that test.⁴⁰

With these considerations in mind, it is difficult to see how the Commission could effectively interpret the statute by adopting general rules, with the exception of the two few instances in which it already has. Defining what constitutes an actual prohibition in advance is especially difficult. Either a particular provider is prohibited – unable to provide service – or it is not. If a provider is actually serving customers in a jurisdiction, or has made no actual, good faith attempt to provide service or to comply with a local requirement, there is no justification for decision holding that there has been a prohibition.⁴¹ By the same logic, a general rule that a particular practice or requirement is a prohibition cannot be justified in the abstract. Nor can the Commission ban certain kinds of fees without considering the actual context in which they are enforced. The fact that a provider or the Commission dislikes a requirement does not make it a prohibition.

In other words, whether a particular requirement constitutes a prohibition on the provision of service is fundamentally a fact-based determination that can only be handled effectively by individual adjudication. The Commission may have the power to define additional terms used in Section 332(c)(7), but it would be unwise to exercise that authority.

⁴⁰ See, e.g., *T-Mobile Northeast, LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259, 268 (4th Cir. 2012) (to show prohibition, carrier must establish general policy that effectively guarantees rejection of all applications; *Sprint Telephony PCS, L.P., et al. v. County of San Diego, et al.*, 543 F.3d 571, 576 (9th Cir. 2008).

⁴¹ For example, many of the early court decisions interpreting the parallel language of Section 253(a) misinterpreted this concept and proceeded to strike down ordinances and agreement terms that did not actually prohibit the delivery of service, but could be construed as possible inhibitions. In reality, those terms might have been more or less burdensome to the carrier, but were not actually prohibitions of the sort that concerned Congress. The Commission should not make the same mistake by trying to define “prohibition” outside of a specific factual context.

III. SECTION 253 DOES NOT GRANT THE FCC THE AUTHORITY TO REGULATE THE TERMS OF ACCESS TO THE PUBLIC RIGHTS-OF-WAY.

As noted in Part II, the United States Supreme Court has held that the Commission is entitled to deference when interpreting a statute that concerns the scope of its own authority. *City of Arlington, Texas et al. v. FCC et al.*, 133 S. Ct. 1863 (2013). *City of Arlington*, however, does not address the Commission’s specific authority under Section 253. Furthermore, because in Section 253(d) “Congress has established a clear line” that the Commission cannot cross, *City of Arlington* demands that the Commission refrain from any attempt to preempt local requirements related to the management of the rights-of-way or compensation for their use.

A. The Commission Wisely Chose Not To Pursue this Question in 2009.

One of the issues raised in the *2009 Declaratory Ruling* was whether the Commission should preempt under Section 253(a) any local ordinance that requires a wireless service provider to obtain a zoning variance before being permitted to install wireless facilities. Fairfax County and Henrico County were among the jurisdictions that filed comments opposing that specific suggestion.⁴² The Commission wisely rejected the request on the basis that no specific ordinance was at issue in the proceeding, while also apparently assuming that the agency had the necessary authority.⁴³ Now that the question has again been squarely presented by Mobilitie, again in the absence of a specific ordinance, the Commission should acknowledge that it has no such power.

⁴² *2009 Declaratory Ruling* at para. 66, n. 203.

⁴³ *Id.* at para. 67

The question arises in this instance because one company is aggressively pursuing a business model that depends on access to the public rights-of-way.⁴⁴ Mobilitie is betting that paying lawyers to convince the Commission to force local governments to do Mobilitie's bidding is cheaper than paying private property owners abutting the public rights-of-way for the right to use space on market terms. As we discuss at Part IV(C), below, this will undoubtedly prove true, if the Commission grants Mobilitie's request. Yet, while 5G technology will surely (at some point) require the installation of many more antenna facilities, technological change does not demand the private use of public property. The Communications Act and the Supremacy Clause do not justify regulation for the mere convenience of a private entity.

Mobilitie also has made far-reaching claims about fees charged by local governments, without naming any of the jurisdictions, or offering any explanation of the context in which the fees might have been proposed. There are many practical reasons why the Commission should once again stay out of this particular swamp, as discussed below in Parts IV and V, but the fundamental reason, as discussed below in Part III(B), is that Section 253(d) denies the Commission the necessary authority.

The Joint Commenters urge the Commission to resist the temptation to act simply because a member of the communications industry has made a superficially attractive proposal. This is not the first time the Commission has initiated a proceeding aimed at granting favored entities access to real estate. For example, in 1999, the FCC initiated the *Competitive Networks*

⁴⁴ Of course, now that the Commission has taken Mobilitie's scheme seriously, we can anticipate that the entire wireless industry will be urging the Commission forward. This should not be interpreted as anything other than opportunism.

docket,⁴⁵ in response to the claims of certain fixed wireless providers (Teligent and Winstar), which asserted that private property owners were hindering the advance of competition for telecommunications services. Faced with ample evidence that owners of office buildings and other commercial properties were eager to satisfy the needs of their tenants for competitive services, the Commission settled for prohibiting carriers from entering into exclusive access agreements. Today, Winstar and Teligent are out of business for reasons having nothing to do with access to buildings.⁴⁶

Telecommunications is a highly capital-intensive business, which means incumbents will always have natural advantages. This makes it attractive for new entrants to seek regulatory relief if they can convince regulators to shift costs to somebody else, or force others – whether they own communications networks, utility poles, or real estate – to give them access at regulated rates. Still, the fact remains that such regulation is nothing more than a form of industrial policy, with all the attendant drawbacks. If the Commission meddles with the terms of access to the rights-of-way, whether by limiting fees or mandating access or adopting standards that result in either, it will distort the larger market for wireless siting and very likely in a way that ultimately does nobody any good. If Mobilitie cannot deploy facilities and make money without this kind of regulatory help, how viable is its business? Congress has the right and the

⁴⁵ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673 (1999).

⁴⁶ See Elizabeth Douglass, *Teligent Is Latest Telecom to Fail, File for Chapter 11*, LA TIMES, May 22, 2001, available at <http://articles.latimes.com/2001/may/22/business/fi-942>; Linda Rosencrance, *Winstar files for bankruptcy, sues Lucent for \$10 billion*, Computerworld (April 8, 2001), <http://www.computerworld.com/article/2592267/networking/winstar-files-for-bankruptcy--sues-lucent-for--10-billion.html>

power to make tradeoffs that affect the larger economy; the Commission does not. If Congress wants deployment of wireless broadband service at any cost, it needs to say so. If Congress wants the Commission to disregard the rights and policy concerns of local governments, it must explicitly say that, too – but of course, as Section 253(c) makes clear, Congress has done just the opposite. It is not the FCC’s job to manage Mobilitie’s costs.

The Commission should also consider that, in 2005, Arlington County was approached by Mobilitie’s competitor, NextG, now a subsidiary of Crown Castle. NextG requested an agreement granting it access to the County’s rights-of-way and after a few months of negotiation NextG and the County agreed on terms. NextG never exercised its rights, however, nor did NextG ever formally terminate the agreement or explain its change in plans to the County. We raise this example both because it illustrates that local governments in Virginia have long been willing to accommodate the needs of the wireless industry, and because it shows that providers may make all kinds of claims and urge all kinds of solutions, but plans and circumstances change. The Commission should not make national policy just to accommodate one company’s business model.

Indeed, if Mobilitie obtains access to local rights-of-way and installs its equipment, where is the guarantee that new deployment will occur? What if the carriers delay implementing 5G in that particular area? What if Mobilitie prices its poles too high for the carriers? Mobilitie does not actually provide service to wireless users.

B. Congress Has Drawn the “Clear Line” Called for by *City of Arlington*: Only the Courts May Interpret Section 253(c).

In the years immediately after Section 253 was enacted, a number of courts were asked to examine the relationship between Sections 253(a)⁴⁷ and 253(c),⁴⁸ which resulted in a range of analytical approaches to local government requirements. Two principal questions were raised in the early cases: (i) what constituted a “prohibition” under Section 253(a); and (ii) whether Section 253(c) created an independent right of action, or instead created a safe harbor against preemption in the case of a violation of 253(a). In 2007, however, the Eighth Circuit issued its opinion in *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) (“*Level 3*”), *cert den.* 557 U.S. 935 (2009). *Level 3* has since become the standard analytical framework for Section 253 cases.

Level 3 arose after Level 3 Communications had entered into a license agreement with the City of St. Louis. That agreement called for an annual license fee based on the number of linear feet of conduit installed by Level 3 in the City’s rights-of-way. Four years after signing the agreement, Level 3 refused to continue to pay the license fee and sued the City, alleging that the agreement violated Section 253. Even though Level 3 had been actually providing services in the City under the Agreement and admitted that it could point to no services that it was not

⁴⁷ Section 253(a) states:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

⁴⁸ Section 253(c) states:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

able to provide, the district court ruled that the Agreement was an effective prohibition under Section 253(a), and then proceeded to examine the agreement in light of Section 253(c). The court upheld the non-fee requirements of the agreement, but struck down the linear-foot fee, ruling that to constitute “fair and reasonable” compensation the fee had to be related to the City’s actual costs arising from Level 3’s presence in the rights-of-way.

On appeal, the Eighth Circuit reversed. The court held that “a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of a prohibition,” which many earlier decisions had permitted. Whereas those decisions had accepted a provider’s mere allegations that ordinance requirements or agreement terms might deter them from providing service, and then declared the challenged provisions to be invalid under Section 253(c), the *Level 3* court recognized that Section 253(a) did not call for the evaluation of hypothetical claims about prohibitory effects. Only upon a showing of an actual, existing prohibition or prohibitory effect would the court proceed to evaluate any requirements pertaining to right-of-way management or compensation. *Level 3*, 477 F.3d at 533.

As *Level 3* itself observes, the Eighth Circuit’s 253 analysis has the additional virtue of following the Commission’s own analytical framework in a decision issued soon after Section 253 was enacted. In *California Payphone Ass’n v. FCC*, 12 FCC Rcd 14191 (1997) (“*California Payphone*”), the City of Huntington Park had adopted an ordinance that required payphones in the City’s central business district to be installed indoors, on private property. The purpose of the measure was to reduce crime in the affected area. The California Payphone Association argued that, when combined with other measures adopted by the City, the ordinance created an effective monopoly and thus prohibited payphone operators other than Pacific Bell from providing service. The Commission ruled that the ordinance was not a prohibition under Section

253(a) because it did not materially limit competition, and then noted that although it did not need to analyze the ordinance under Section 253(b), that would have been the next step if there had been a violation of 253(a).⁴⁹

The *Level 3* analysis is so clearly correct that the following year the Ninth Circuit overruled its own precedent and adopted the Eighth Circuit's analysis. In *Sprint Telephony PCS, L.P., et al. v. County of San Diego, et al.*, 543 F.3d 571 (9th Cir. 2008) ("*San Diego*"), Sprint had challenged the County's wireless telecommunications facilities ordinance under both Section 332(c)(7) and Section 253(a), claiming that the ordinance prohibited or had the effect of prohibiting the provision of service. The district court had followed *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) ("*Auburn*"), and found a violation of Section 253(a). The Ninth Circuit, however, recognized that although the two statutes use almost identical language in banning prohibitions on service, the Court of Appeals had adopted a different analysis under each statute. Without deciding which statute applied to Sprint's challenge, since they were identical anyway, the court overruled its prior decision in *Auburn*, relying on *Level 3*. The Ninth Circuit now applies the same analysis to the equivalent passages in both 332(c)(7) and 253(c).⁵⁰

⁴⁹ The Commission has applied the same analysis in other cases. See, e.g., *In AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd 11064 (1999).

⁵⁰ At this point, the First, Second, Eight, Ninth, Tenth and Eleventh Circuits, as well as district courts in the Fifth and Seventh Circuits have adopted this analysis, following *California Payphone*. See *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *Level 3 Comm'ns, LLC v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *BellSouth Telecomm'ns, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *City of New Orleans v. BellSouth Telecomm'ns, Inc.*, 2011 U.S. Dist. LEXIS 60925 (E.D. La. 2011); *Illinois Bell Tel. Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N. D. Ill. 2007).

Incidentally, although the *Notice* cites *Auburn*, the *Notice* does not cite *San Diego*, and fails to mention that the *Auburn* test has been abandoned. This curious omission should be corrected, because it leaves the erroneous impression that *Auburn* – which permitted preemption based on hypothetical claims – is the prevailing test. The *Level 3/San Diego* analysis is especially important because it not only avoids that error, but is much more favorable to local governments.

We now come to the question of how the Commission should address claims for the preemption of local requirements under Section 253. The key to the analysis is Section 253(d), which states as follows:

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

There is thus no doubt that the Commission has the power to interpret Section 253(a) in adjudicating a specific case. Congress has expressly declared that the Commission may declare a local requirement to be preempted if it actually prohibits or has the effect of prohibiting service. As the *Level 3* and *San Diego* courts have noted, a mere hypothetical claim of prohibition, or an allegation that something in an ordinance or agreement might amount to a prohibition, is not enough. And while the Commission may claim the right under *Chevron* to interpret the statute as it sees fit, the standard under *California Payphone* is the same as that of the Eighth and Ninth Circuits: a local requirement must “materially” limit the ability of a competitor to provide service. Speculation won’t do.

Section 253(d), however, expressly grants the FCC authority to interpret Section 253(a) only as applied to a specific “statute, regulation or legal requirement” “permitted or imposed” by

a local government. Furthermore, the Commission may only preempt enforcement “to the extent necessary to correct such violation or inconsistency.” This is a grant of authority for case-by-case adjudication and nothing more.

Congress has also given the Commission the authority to apply Section 253(b), which creates a safe harbor for certain types of state-level regulation of telecommunications providers.⁵¹

On the other hand, Congress also limited the Commission’s power under Section 253(a) by excluding matters within the scope of Section 253(c).

Section 253(b) and Section 253(c) are both equally exceptions to Section 253(a), but in granting the Commission the right to interpret only 253(b), by virtue of the time-honored (and logical) doctrine of *expressio unius est exclusio alterius*, Section 253(d) expressly denies the Commission the authority to say anything about the meaning of Section 253(c), even if there is a claim under Section 253(a). Furthermore, Section 253(d) is a direct instruction to the Commission to preempt in certain, specific cases. Section 253(d) is the “clear line” Justice Scalia demanded in *City of Arlington*. Congress wanted only the courts to interpret Section 253(c).⁵²

⁵¹ Section 253(b) states:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

⁵² The Sixth Circuit’s opinion in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) has no bearing on this case. There the court ruled that the Commission has general rulemaking authority under Section 201 of the Communications Act [47 U.S.C. 201(b)], which allowed the FCC to issue regulations interpreting Section 621 [47 U.S.C. 541], subject to court review under Section 635. But in *Alliance for Community Media* there was no analogue to Section 253(d), which restricts the FCC’s authority in a way not present in Sections 621 or 635.

Nor can the Commission claim that Section 253(d) only applies to challenges to specific ordinances or other local requirements, as it did in the *2009 Declaratory Ruling* and *City of Arlington*. It surely does apply to such challenges, but it must also apply to attempts to regulate local governments by defining “fair and reasonable compensation,” “manage[ment]” of the public rights-of-way, and “use of public rights-of-way on a nondiscriminatory basis.” This has to be true to prevent the Section 253(d) exclusion from having no meaning, for three reasons. First, by directing the Commission to adjudicate cases “to the extent necessary to correct such violation or inconsistency,” Congress excluded other alternatives. The specific statement in Section 253 controls over the general grant in Section 201(b). Second, without such a limitation, the Commission is left free to adopt highly restrictive definitions that so limit local discretion as to make that discretion meaningless. And third, the very nature of the issues addressed by 253(c) demands case-by-case examination rather than broad rulemaking. “Nondiscrimination” depends on context. So does “fair and reasonable” compensation. While the words in isolation may seem ambiguous, they only have meaning when evaluating particular requirements imposed on a particular provider in a particular competitive context.

Congress left these Section 253(c) matters to the courts of general jurisdiction because they are not fundamentally telecommunications policy matters within the Commission’s expertise; they are not like the universal service and consumer protection matters protected by Section 253(b). The Commission’s expertise does not extend to the technical aspects of right-of-way management, which is far more complex than regulating pole attachments under Section

Nor did we have the benefit of the clarification of the Commission’s authority under *Chevron*, as delineated in *City of Arlington*. If Section 253(d) is not a “clear line,” no such line exists in the Communications Act.

224 of the Communications Act.⁵³ Nor does it extend to the intricacies of state law governing the authority of cities, counties, and towns to manage and obtain compensation for the use of public property.

In the end, Congress meant for the Commission to have no rulemaking authority here because there is no gap to be filled by regulatory action: the questions at issue only arise in specific contexts, and the courts are the experts equipped to decide that kind of dispute. Providers do not need a regulatory gap in Section 253(c) to be filled by the Commission, because by excluding Section 253(c) from Section 53(d), Congress has allowed local governments to set the policy, not the FCC. If providers are aggrieved by the local policy decision, they have a remedy in court or with the local governing body.

This is not a case where an entity regulated by the Commission needs the agency to act so it will know how to conduct its business without violating the law. Nor is there any question in Section 253(c) to be decided about federal communications policy. Section 253(a) sets the federal policy, and local governments set the local policy under the oversight of the courts. Allowing the FCC to narrow the scope of local authority (which all concerned understand to be the intent here) would federalize the entire arrangement in a way that Congress never intended.

In other words, the reasons that agencies are permitted to fill in gaps in the Congressional scheme under *Chevron* simply do not exist in this case.

Nor is Section 253(c) like Section 332(c)(7). In the *2009 Declaratory Ruling*, the Commission found that it had the authority to interpret the existing limitations in the statute – specifically the meaning of the phrase “within a reasonable period of time” – but the

⁵³ 47 U.S.C. 224. See summary of the Joint Commenters’ permitting practices above at Part I, and discussion of permitting issues at Part IV(B), below.

Commission would not have had the authority to add new requirements.⁵⁴ Setting a reasonable time period is a fairly straightforward matter. Assessing the gamut of right-of-way management practices and forms of compensation in a regulatory framework is a completely different and much more complex matter. For instance, when the Congress wants the Commission to regulate rates (which is really what Mobilitie has asked for) it does so in no uncertain terms, and in considerable detail, as illustrated by Sections 224 (pole attachments) and 623 (cable television rates), and the various provisions of Article II related to common carrier rate regulation. Section 253(c) is in no way a rate regulation statute.

C. Congress Did Not Intend for Section 253 to Apply to the Use of Public Rights-of-Way by Wireless Providers.

The nearly identical language of Sections 253(a) and 332(c)(7)(B) supports the proposition that Congress meant the same standard to apply in both cases.⁵⁵ This suggests that the two statutes address different subjects.

Indeed, there are many good reasons for this. Wireless services and traditional wireline services are not the same. This ought to go without saying; it is not as if the obvious technological difference has no real-world consequences, no matter how hard lawyers may try to confuse the matter. As written, Sections 253 and 332 address the practical differences between wireline and wireless networks and facilities. Congress adopted the same standard for “prohibitions,” and they apply to different classes of entities.

While wireless and wireline services may be substituted for each other, they are not complete substitutes, simply because wireless services are typically mobile, and wireline services

⁵⁴ *City of Arlington v. FCC*, 668 F.3d 229, 252 (5th Cir. 2012).

⁵⁵ *San Diego*, 543 F.3d at 579.

never are. This is why Title III of the Communications Act applies to wireless providers but not to wireline companies. They are distinct services historically, technologically, and in how they use public property. Wireline providers require access to public rights of way to deliver their services to customers, for the simple, practical reason that every potential customer of a traditional telephone company is located on property adjacent to or very close to the public rights-of-way. For a local government to exclude a traditional telephone company's facilities from the public rights-of-way would be an effective ban on the ability to provide service within that jurisdiction, so Congress decided they needed the protection of Section 253. Wireless companies, however, do not face this obstacle. One of the many advantages of the wireless industry is that it requires much less limited use of real property and absolutely no use of public rights-of-way. There is no lack of private property owners willing to make space available to such companies on competitive terms. Any argument to the contrary is comparing apples to oranges.

Section 332(c)(7) and Section 253(a) are parallel provisions, aimed at removing the main obstacles to deployment of services by wireless companies on the one hand, and wireline companies on the other. Otherwise there would have been no need to enact two separate provisions. This is especially the case because the Commission has the power to adopt rules interpreting Section 332(c)(7). There is simply no need for the Commission to have separate authority in Section 253 for the same purpose.

Nor does any desire to promote deployment of 5G services affect this analysis. Yes, 5G deployment will require the installation of many more small cells, especially in densely populated and built-up areas. Yes, Mobilitie and its competitors may find it convenient to use public rights-of-way for that purpose. They would especially find it convenient were the

Commission to mandate access to the right-of-way, or preempt local government authority over the price of access. But the Telecommunications Act does not grant the Commission the authority to grant access or regulate rates simply because a class of carriers finds it convenient.

D. Mobilitie Is Not Entitled to the Benefit of Section 253(a).

Mobilitie is not a provider of personal wireless services. It holds no Commission license for the use of radio frequency spectrum, it does not lease spectrum from a licensee of such frequencies, and it does not sell wireless service to the public. Section 253(a) bans requirements that prohibit “the ability of any entity to provide interstate or intrastate telecommunications service.” As far as the Joint Commenters are aware, Mobilitie merely provides equipment that retransmits carrier signals; in fact, it is our understanding that Mobilitie does not even own all of the equipment that is used in that process. Consequently, Mobilitie is not providing a telecommunications service.⁵⁶ It would be helpful for the Commission to clarify Mobilitie’s status, since the company seems reluctant to do so; in fact, such a clarification would seem to be essential to a decision on the company’s petition, for the reasons just stated.

E. The Commission Should Not Intrude on the Primacy of the Courts.

It is well established that the courts have jurisdiction to interpret Section 253(a) and to evaluate local requirements falling within Section 253(c)’s safe harbor for right-of-way management and compensation.⁵⁷ The *Notice* observes that the Courts of Appeal for various

⁵⁶ Of course, the existing carriers are providing service now, and very successfully. It is hard to see how they can claim that the same procedures under which they have operated so successfully for so long are suddenly a prohibition.

⁵⁷ See, e.g., *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *Level 3 Comm’ns, LLC v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007); *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa*

circuits seem to have reached different results in applying the statute.⁵⁸ This kind of divergence, of course, is a fundamental aspect of our judicial system, and it is ultimately up to the Supreme Court to resolve those inconsistencies, if the parties care enough to seek Supreme Court review, and the Court agrees that the conflict is important enough that it must be resolved.

The Supreme Court has not addressed the application of Section 253(c), perhaps because few affected entities have sought review. There certainly have been few opportunities for such review. By our count, there have only been about twenty cases decided under Section 253(c) at the appellate level, many for issues irrelevant to the Commission's concerns. This paucity of cases suggests that this type of litigation is rare, and because disputes are rare, there is no justification for the Commission to try to force uniformity.

The FCC also should remember that *Chevron* is a judge-made rule. *Chevron* deference is a product of neither the Communications Act nor the Administrative Procedure Act, and it is certainly not a Constitutional requirement. Although *Chevron* is the law today, the doctrine has come under increasing scrutiny in recent years. In fact, *City of Arlington* was a 5-1-3 decision, with a strong dissent from the Chief Justice. *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., *dissenting*). Another interesting case was decided more recently by the Tenth Circuit.

Fe, 380 F.3d 1258 (10th Cir. 2004); *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

⁵⁸ *Notice* at 13. As noted above, however, the *Notice* is misleading because it cites *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), for the proposition that the Ninth Circuit has ruled that the mere adoption of a fee by a local government constitutes a barrier to entry and is therefore preempted by Section 253(a). Under the Ninth Circuit's current analysis the court would not have reached the fee issue because there was no evidence of an actual (as opposed to a presumed, prospective possibility) of a barrier to entry. See *San Diego*, 543 F.3d at 578-579.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1154-55 (10th Cir. 2016) (Gorsuch, J., *concurring*) (criticizing *Chevron* and *City of Arlington* as a violation of separation of powers).

Furthermore, the resolution of circuit conflicts is perhaps the single most important reason that the Supreme Court grants *certiorari*, and it is one of the key statutory functions of the Court.⁵⁹ *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005), notwithstanding, the Commission should not imagine that it has a role in resolving the circuit splits alleged in the *Notice*.⁶⁰ For the Commission to assume the Supreme Court’s function while stretching beyond the clear limits of its authority would seem to be tempting fate.

F. Any Attempt To Regulate Access to Public Rights-of-Way Under Section 253 Will Raise Questions Under the Takings Clause of the Fifth Amendment.

One very good reason that only the courts are permitted to decide Section 253(c) cases, and must do so on a case-by-case basis, is that any attempt by the Commission to require local governments to make their rights-of-way available to wireless providers could raise Constitutional claims under the Fifth Amendment.⁶¹

For example, if Section 253(c) applies to a particular application or request, and a local government appears to have violated the statute, applicants have the right to sue and challenge

⁵⁹ 28 USC § 1254.

⁶⁰ We note in passing that simply because courts reach different outcomes based on different facts and circumstances does not mean that they are actually in conflict on the law.

⁶¹ The Fifth Amendment requires that governments pay “just compensation” when they take private property. This includes the taking of local government property by the federal government. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893). The Supreme Court has held that the measure of compensation is fair market value, unless that value cannot be ascertained. *Fifty Acres of Land* at 29-30.

the offending process or requirement on an as-applied basis. Attempts by the Commission, on the other hand, to interpret the safe harbor provisions of Section 253(c) will by necessity be broad, general, imprecise, and subject to further interpretation. In that case, little has been gained by Commission intervention, unless the goal is merely to narrow the range of choices, and favor providers over local governments. Or the Commission's interpretations will take the form of outright bans and outright bans on local government actions are the most likely to result in Constitutional violations.

Although the Commission claims to be the expert agency in this matter, it is not an expert in the field of right-of-way management. Flawed regulations that attempt to define "nondiscriminatory" or "competitively neutral," for example, could result in *de facto* mandates to open up rights-of-way to all comers, regardless of safety concerns or willingness to pay a fair price.

In any event, if a Commission rule attempting to define an element of 253(c) is sufficiently broad, the rule could raise a takings claim on its face, in which case the Commission will have exceeded its authority. The courts read statutes and regulations to avoid raising Constitutional violations.⁶² Consequently, Section 253(a) must be read to preclude the Commission from mandating access to property or adopting any requirement that would raise a Fifth Amendment takings claim on its face.

Even if the Commission can avoid a facial challenge, the Joint Commenters urge the agency to consider that even less sweeping definitions of the key statutory terms may lead to as-applied claims later, when carriers seek access, are denied access or refuse to pay fees, and then

⁶² *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); *Edward J. DeBartolo Corp. v. Fla Gulf Coast Bldg and Construction Trades Council*, 485 U.S. 568, 576 (1988).

sue under the Commission's interpretation, leaving the courts to resolve the matter. Congress never intended to create this kind of dispute. Regardless of how the law may have developed since Section 253 was enacted, one thing is clear: Congress meant to limit federal intervention in local rights-of-way management. It is hard to imagine that Congress believed it was opening the door to takings litigation when it drafted Section 253(c). And once the Commission does open the door it will be very hard to close. The range of factual circumstances that might arise in a nation with over 30,000 local governments, a myriad of state and local laws, and a need for tens of thousands of antenna sites simply cannot be accounted for in a one-size-fits-all regulation. The Commission cannot be sure that any rule it might adopt that is intended to promote access to the rights-of-way would not raise any number of valid Constitutional claims.

Nor should the Commission content itself with the thought that it can solve the Constitutional problem by interpreting the "fair and reasonable" standard in the statute to provide for minimal compensation. There are at least two problems with this idea.

First, if the Commission adopts a rule that results in the granting of physical access to the property of another, including the public rights-of-way, the occupancy of that property constitutes a *per se* physical taking.⁶³ In that case, the only lawful measure of compensation to be paid to the owner of the rights-of-way is "just compensation," in accordance with the Fifth Amendment, and corresponding case law.⁶⁴

⁶³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Century Southwest Cable Television, Inc. v. CIIF Assoc.*, 33 F.3d 1068, 1071 (9th Cir. 1994) (Cable Act did not authorize invasion of private property to allow cable operator access to apartment building residents).

⁶⁴ *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

Second, the Commission cannot set the measure of compensation. Only a court can award just compensation for a taking.⁶⁵ For the Commission to both force a locality to accept placement of facilities on its property, and then determine what the locality can charge, violates the separation of powers. Accordingly, the discussion of cost-based rates and other methods of compensation in the *Notice* is irrelevant. If a court finds there has been a taking, the court will set aside the Commission's rate and determine just compensation using the usual standard, which is the fair market value of the property. And, as it happens, there is a ready measure of market value: the tens of thousands of leases and other agreements for the use of property – very often immediately adjacent to the rights-of-way – that carriers have willingly signed. This is not a cost-based standard, so the Commission cannot adopt a rule that limits local governments to cost recovery-based fees. It is a market rate standard, and the Commission has two lawful choices: acknowledge that fair market value is the standard, or remain silent.

G. Current Local Practices in Virginia Comply With Section 253.

Under *California Payphone*, the first step in evaluating local requirements is to apply Section 253(a) to determine whether there is a “prohibition” on the provision of service. Assuming for the sake of argument that Mobilitie or the wireless carriers actually have rights under the statute, there is no prohibition under Virginia law or any local requirements.

All of the major wireless carriers have been operating in Northern Virginia and the Richmond area successfully for many years. Mobilitie has only begun the process of obtaining the necessary permission from each of the Joint Commenters, but none has a legal requirement

⁶⁵ *Baltimore & O.R.R. v. United States*, 298 U.S. 349, 368 (1936) (“Congress may not directly or through any legislative agency finally determine the amount of [compensation]; *Seaboard Air Line Rwy v. United States*, 261 U.S. 299, 358 (1923) (“the owner’s right to just compensation cannot be made to depend upon state statutory provisions”).

that could be deemed a material limitation on Mobilitie's activities. Not only is Mobilitie free to obtain the right to use private property in the same way that the carriers have, but Mobilitie can install its facilities in the Joint Commenters' rights-of-way on very reasonable terms.

Henrico County has granted Mobilitie the right to attach its facilities to utility poles in the County's rights-of-way subject only to a basic safety inspection requirement. Alexandria anticipates concluding a license agreement with Mobilitie very soon, under which Mobilitie will pay only modest, below-market compensation for the use of the City's rights-of-way. Traffic permits and other generally applicable safety requirements will also apply. In Arlington, Mobilitie will need to comply with existing generally permit requirements for traffic safety and excavation in the rights-of-way. Installations outside of the rights-of-way may require zoning approval. Finally, the only restriction Fairfax County places on Mobilitie's installation in the rights-of-way is compliance with the County Zoning Ordinance.

Furthermore, none of Mobilitie's allegations pertaining to supposedly excessive and unfair fees for use of the rights-of-way apply in Virginia. The existing fees are entirely reasonable, and SB 1282 further limits them.

Because there is no actual prohibition preventing Mobilitie from operating within the jurisdictional boundaries of any of the Joint Commenters, Section 253(a) has not been violated. Even it were, however, all of the requirements discussed in Part I that could apply to Mobilitie fall well within the Section 253(c) safe harbor. They are all clearly directed at the responsible management of the rights-of-way.

Mobilitie also has obtained significant benefits under other aspects of Virginia's regulatory scheme. Most telecommunications and cable providers are subject to the public rights-of-way use fee, but Mobilitie does not collect or pay the fee.

IV. MOBILITIE’S PROPOSALS FOR REGULATING COMPENSATION ARE NOT ONLY INCONSISTENT WITH THE LAW, BUT ALSO UNREASONABLE AND UNNECESSARY.

The genesis of this proceeding lies in Mobilitie’s business plan, which currently relies on inducing the Commission to force local governments to make their property available to Mobilitie at below-market prices. Of course, the Commission has no obligation to assist Mobilitie or any other particular entity, nor should it. Aside from its mistaken analysis of the Commission’s authority, Mobilitie’s Petition rests on several flawed policy assumptions, including confusion about the nature of certain payments required by local governments, and violations of economic principles underlying federal policy.

Because Mobilitie seeks to use the power of the federal government to unfairly lower its costs, it is ultimately making an economic argument. Unfortunately for Mobilitie, applying sound economic principles requires the rejection of its proposals.

A. The Key Issue Raised By Mobilitie’s Petition Is Whether Infrastructure Owners and Wireless Providers Are Actually “Similar” to Wireline Providers and Other Public Utilities.

We have little doubt that at some point Mobilitie will argue that if the incumbent wireline carriers or other entities that currently use the rights-of-way in the same fashion are not paying certain types of fees, Mobilitie should be allowed to install its facilities at little or no charge. This is another reason that the Commission should pursue this matter no further. Mobilitie is not similar to wireline carriers, because it does not actually need access to the rights-of-way to deliver its services. Mobilitie – like the wireless carriers – has ready access to private property for placing its equipment. The Commission has adopted rules designed to expedite the placement of antennas and other wireless equipment, which already benefits Mobilitie. Wireline carriers, on the other hand, cannot readily use private property to extend their networks in any

significant fashion. They are utterly dependent on the public rights-of-way or on the necessarily cumbersome process of acquiring easements.

We might be more sympathetic if Mobilitie were prepared to agree to the kind of universal service and carrier of last resort requirements that originally justified the ubiquitous access to rights-of-way granted to local telephone companies over a century ago. Of course, those obligations have largely been lifted – they no longer exist in Virginia, for example – and in fact Section 253’s preemption of monopoly rights for carriers has played a large role in that process. Mobilitie would surely never agree to such obligations; after all, it does not actually provide telecommunications services. So if Mobilitie wants to use local rights-of-way, it should be willing to pay a reasonable rate. If it can get access from local governments at rates below those offered by the private real estate market abutting the rights-of-way, so much the better. But mandating access or setting rates by the Commission would not be justified, even if it were lawful.

B. The Commission Must Take Care to Understand the True Nature of Various Types of Payments.

The Commission’s *Notice* conflates true permit fees with rental charges for the use and occupancy of the rights-of-way. Leaving aside the specific holdings of the various courts of appeal cited on page 13 of the *Notice*, those cases addressed payment for the right to use public property, not charges for permits that are typically required for such matters as blocking a lane of traffic, or to cover the cost of inspection of construction in the rights-of-way. Any analysis needs to distinguish between the two sets of costs because different legal analyses apply. The former are in the nature of rent, and it should not be a surprise that they would be “recurring charges,” as Mobilitie calls them. After all, electric companies and telephone companies collect “recurring” fees for the use of their poles, and wireless companies pay rent for antenna sites on towers and

buildings. A fee charged as compensation for the right to physically occupy rights-of-way owned by a city is directly analogous to those charges.

The second category, permit fees, is not like rent. These are one-time charges related to the management of the rights-of-way, not compensation for the use of property. They may be intended in part to recover some of the costs arising from the local government's management responsibilities, but they can also advance other policy goals. For example, a traffic control permit (as opposed to a construction permit) is not difficult to review or administer; no inspections are required, for example. And yet the fee may be based at least in part on the number of feet of traffic lane to be blocked by the permit holder while it is working in the rights-of-way. Blocking traffic may not impose direct costs on the local government, but it does inconvenience the public. If there were no charge for permits that block traffic, telecommunications providers and other using the rights-of-way might be inclined to request that a larger area than needed be blocked off. After all, it would cost them nothing. In less dense suburban areas this may not be a concern, but in a congested urban environment, blocking traffic imposes real costs on the community at large. In other words, the Commission should not assume that limiting permit fees to cost recovery is actually fair or reasonable.

C. Regulation of the Terms of Compensation for Use of the Public Rights-of-Way Would Interfere with the Existing, Functioning Market for Sites on Private Property.

There can be little doubt that Mobilitie is motivated in large part by the desire to avoid paying fair market rental rates to private property owners. Otherwise, a simple set of rules similar to the small cell zoning rules in SB 1282 would be more than sufficient. Instead, Mobilitie is urging the Commission to adopt an industrial policy, under which the company would be granted access to the rights-of-way at the lowest possible cost, ideally zero.

Mobilitie is asking the Commission to interfere with a thriving market, which has been meeting the wireless industry's needs for access to antenna sites since before the enactment of the Telecommunications Act of 1996. The Commission has never suggested that it should try to regulate that market, but that would be the effect of the intervention Mobilitie seeks. This is especially true because, unlike cable and traditional telephone service, access to the public rights-of-way is not necessary for the delivery of wireless service. Wireless providers are free to negotiate with private property owners for the right to place their facilities, and by limiting local zoning authority, the FCC has already done more than enough. Access to the public rights-of-way is an entirely different matter, and there is no need for the FCC to concern itself with this question. Regulation that hinders or facilitates access to public rights-of-way will affect the private real estate market, not just local governments, and should not be undertaken without evidence of a market failure.

As much as the Commission understandably desires to promote the deployment of wireless services, fair regulation should not favor wireless companies by forcing access to rights-of-way, or setting artificially low prices for use of public property, when wireless providers already have access to private property in a way that is not practical for wireline companies.

In addition, the Commission should not consider Mobilitie's requests any further without a clear understanding of the consequences of its proposed intrusion.

Commission regulation would interfere with the real estate market for antenna sites in two ways. First, any regulation that forces local fees for the use of the rights-of-way to be set below the market rate, when wireless providers have the option of negotiating with private landowners, would likely reduce the amount private parties could charge and distort that market in favor of placement on public property. This is because Mobilitie is asking to pay cost-based

rates or even – if its arguments about nondiscrimination are accepted – to be allowed to use the rights-of-way at no charge. And, of course, the regulation itself would distort the market for the use of public property by forcing the rights-of-way holder to charge below-market prices.

Second, wireless providers are entering the rights-of-way in a different environment, and use the rights-of-way in a different manner from the traditional providers (cable, telephone, and electric power). Section 253 was not intended to apply in this context, for the reasons discussed earlier.

Standard economic theory and regulatory practice would call for the regulation of fees only if there were a market failure. Because there is a thriving private market for use of private property by wireless carriers, to which Mobilitie and wireless carriers have unfettered access, there is no such rationale in this case. If Mobilitie prefers to use public property, then it should be willing to pay the market rate. Although Mobilitie's petition claims that local governments have the power to charge "monopoly" rates, because of their control over the rights-of-way, the availability of private property adjacent to the rights-of-way as a substitute for siting in the rights-of-way defeats that argument.

Finally, attempting to compute fees based on a comparison of relevant charges, or comparison of the burden of different deployments, as proposed by Mobilitie, would be burdensome, time-consuming, impractical, and would only led to dispute and litigation. Surely the Commission sees the irony, in this day of deregulation and telecommunications competition, in having been asked to regulate the fees charged by local governments on the basis of cost. This is exactly the kind of regulation the FCC has been moving away from since 1996, both because it was bad economics and because it was difficult to administer. But at least in the past, price regulation was done openly and for good reason.

In any case, how would the FCC effectively regulate the cost of issuing permits? Would local public works departments be required to submit forms to the Commission showing their costs, and computing an allowed rate based on a Commission formula? Of course not. Congress hasn't told the Commission that it should regulate such fees or how to do it. Furthermore, adopting a complete FCC-run regulatory scheme out of whole cloth would get the attention of the courts. It would be too obvious that the Commission had gone too far.

It is also ironic that the Commission would consider what amounts to a subsidy of Mobilitie and wireless carriers, when one of the key principles underlying the Telecommunications Act of 1996 was the elimination of implicit subsidies. Yet now the Commission is apparently considering the possibility of adopting rules that would implicitly subsidize the activities of the wireless industry by giving applicants access to public property at below-market rates. Just because the subsidy harms entities that are not in the telecommunications business it does not follow that the subsidy is either economically sound or consistent with Congressional policy.

There is no reason Mobilitie cannot negotiate the price of access to public property, including rights-of-way, just the way other wireless providers negotiate with private property owners for access to rooftops and tower sites. Nor is Mobilitie's claim that local governments have a monopoly over right-of-way access⁶⁶ true in this instance: because Mobilitie does not really need the rights-of-way – it has an alternative, which vitiates any pricing power local governments have. Consequently, localities cannot charge unreasonable amounts with the expectation that they will get paid regardless of the cost; they are competing with private

⁶⁶ *Mobilitie Petition* at p. 4.

property owners. Even if all of Mobilitie's claims about fees and denial of access are true, the real question is whether the company had other alternatives, and what was the cost of those sites.

And that, of course, is the point. For example, the market rate for cellular antenna sites in the Washington, D.C., area falls between roughly \$2,000 and \$4,000 a month, depending on the location. Assuming that a small cell site would cost considerably less, perhaps \$500 a month, or \$6000 a year, how does that compare to what Mobilitie might pay to use local rights-of-way in Virginia? Currently, permit fees for installing a single utility pole in the rights-of-way would amount to a one-time cost of perhaps \$500 to \$1600, depending on the jurisdiction.⁶⁷ After that, the cost is essentially zero.

In other words, over a 10-year period, the private site will cost \$60,000; the public site will cost Mobilitie \$1600 or less, and no more. It's no wonder that Mobilitie wants regulated access to the right-of-way.

D. Mobilitie Has No Basis for Complaining About Permit Fees.

Permit fees cannot really be an issue for Mobilitie or other providers. Wireless carriers have been dealing with zoning issues for over 20 years, and despite their propensity for telling the Commission that local governments are unreasonable and slow, the fact is that by the Commission's own figures essentially 100% of the U.S. population had access to wireless

⁶⁷ Arlington County does not require a zoning permit for the installation of utility poles in the rights-of-way, but it does require an excavation permit and a traffic control permit. The fee for the former would be \$380 (\$155 base fee plus \$225 new pole fee). The fee for the latter would be \$82.50 (one day of work at \$40, plus a lane closure of fifty feet at \$17.50, plus a no parking sign fee of \$25). In Henrico County, a zoning permit would be required for a new pole, for a total around \$755 (a right-of-way permit fee of \$5 and a zoning permit fee of \$750). In Alexandria, the total would be around \$1,600.

service when the *2009 Declaratory Ruling* was released.⁶⁸ This is remarkable, especially considering that even after more than a century of subsidized telephone infrastructure construction, wireline telephony never reached 100% penetration.

The issue now is the desire to immediately remove all obstacles from Mobilitie's path. We sympathize with the Commission's goals, but it's one thing for the Commission to pursue broadband deployment. It's another to set unreasonable goals, and it's yet a third to impose costs and other burdens on third parties in a vain effort to reach those unreasonable goals. The Commission may have the authority to tilt at windmills, but that doesn't mean it should be allowed to borrow someone else's horse to do the tilting.

In any event, true permit fees are generally applicable charges for performing certain activities – such as blocking a lane or doing construction – and regardless of how they are computed, they are rarely unreasonable, simply because it is not in anybody's interest for them to be so. Furthermore, they are established to address the real needs of managing public property and public safety, as discussed in Part I. Local elected officials respond to the concerns of their constituents, both individual residents and businesses. While nobody likes to pay local permit fees, if they reach truly unreasonable levels local political pressure will eventually bring them back in line. If Arlington charges X times more than Alexandria does for the same class of permit, all other things being equal, providers will build infrastructure in Alexandria first. And when the Arlington County Board gets questions about that, so will the County staff. There is a form of market competition at work here just as there is in the market for equipment siting.

⁶⁸ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket 10-81, Fourteenth Report, 25 FCC Rcd 11407, 11486-89 (2010).

In a country of over 300 million people and more than 30,000 cities, towns, and counties, there may be some communities that have pushed too far in one direction for whatever reason, but it is not in anybody's interest to delay broadband wireless deployment, at least not for very long. And it's not as if Mobilitie and the wireless carriers can build everywhere at once. Communities that allow easy entry will benefit, and those that drag their feet will soon see that they need to adapt.

Given the large number of communities in the country, the diversity of interests in each community, and the strong demand for wireless service, the Commission should not assume that its shot clock regulations are responsible for the speedy deployment the industry has achieved. Its shot clock regulations may be benefitting carriers to some degree, but service was being deployed because there was demand for the service and the industry had the necessary capital. If demand keeps growing, service will keep being deployed, even if the Commission closes this proceeding immediately. Greater respect for local concerns and practices might actually make for a better working environment for all concerned. If the Commission were to tell carriers to go work things out at the local level, perhaps they would find that local procedures are more beneficial than they currently appreciate.

The small cell fees set by the Virginia General Assembly in SB 1282 raise an interesting question. If a locality must show that its fees are somehow related to the cost of managing the rights-of-way for them to be "fair and reasonable," as Mobilitie suggests, how would the Commission evaluate fees fixed by a state statute? They are not cost-based, they just are. One might assume that the Virginia fees are "fair and reasonable" because they are not very high, but what if the statute were amended to increase them by a factor of ten? If the state hasn't done a cost-study, a court would be unlikely to demand one. Instead, the court would look at all of the

circumstances relating to the fee. How much is it? What classes of person pay it? What benefit do those persons get from paying it? If they are harmed by it, to what extent and how? What are the policy considerations that led to the setting of the fee at that level? Was there discriminatory intent?

Fortunately, the Commission does not need to deal with those questions, because regardless of how high or low they are, or how they are computed, the Commission has no jurisdiction over such charges. To the extent that permit fees are not deemed to be compensation for the use of rights-of-way, they may not be subject to the Fifth Amendment concerns raised earlier, because limiting them while effectively mandating access would not create a *per se* taking of property under *Loretto*.⁶⁹ Still, as discussed above at III.B), only the courts have the power to interpret and enforce Section 253(c). Only a court can assess whether a particular fee is “fair and reasonable.”

Finally, by the same token, Section 253(c) only addresses fees “for the use of rights-of-way.” It says nothing about generally applicable permit fees for such matters as routine safety inspections. Should Mobilitie or a wireless carrier have the right to challenge Henrico County’s building permit fees, which are electrical safety inspection fees? They must be paid if Mobilitie wants to use poles in the rights-of-way, but they also apply for certain installations on private property and the County assesses them in the course of performing its duty of ensuring the safety of the public. If the electric power company and the gas company and other businesses are paying the same fees there should be no basis for preemption, no matter how the fee is computed.

⁶⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

E. Regulation of the Terms of Access Will Not Promote Competition, Because Only the First Entrant to Any Given Geographic Market Would Benefit.

As we have discussed above, Mobilitie is in effect asking the Commission to endorse its business plan. In 2016, Mobilitie began approaching numerous localities in Virginia, including all four of the Joint Commenters, regarding placement of facilities in local rights-of-way. At the time, Mobilitie had no agreements in place with pole owners; only in late 2016 did Mobilitie inform the Joint Commenters that it had negotiated a pole attachment agreement with Dominion Virginia Power. We still do not know how many wireless carriers have reached agreements with Mobilitie.

In any event, it seems clear that Mobilitie is pursuing a first mover strategy. By pushing aggressively to obtain access to rights-of-way in a large number of densely-built jurisdictions in a single state, Mobilitie hopes to be able to construct enough infrastructure quickly enough to discourage entry by potential competitors. If it succeeds, Mobilitie will profit by capturing a large portion of the cost savings its carrier customers will earn by not needing to construct their own support structures. And if the company can convince the Commission to grant it the right to use public property at below-market rates, it will further increase its margin. The result will be an effective monopoly in every jurisdiction in which Mobilitie builds first. Thus, the Commission should not imagine that this proceeding will be promoting competition.

Nor will Mobilitie's plan promote consumer welfare through lower prices. As long as Mobilitie charges just enough less than a carrier's cost of constructing its own facilities to make the use of Mobilitie's network attractive, the bulk of the benefit will flow to Mobilitie's bottom line, at the expense of the bottom line of the affected property owners. It's conceivable that

Mobilitie's prices will be low enough to give the carriers more pricing flexibility, so some consumers may benefit – but that's not likely to be what Mobilitie has in mind.

There is nothing wrong with an innovative business plan, or with making a profit. But the Commission has no obligation to enable such a plan, especially when the plan effectively shifts revenue from one industry (public and private real estate owners) to benefit the shareholders of another, with little if any actual benefit to consumers.

F. The Joint Commenters Do Not Object to Disclosing the Amount of Compensation or How It Was Calculated, But Any Regulation Should Require Carriers To Inform Local Governments How Much They Are Paying in Other Jurisdictions.

Mobilitie's request for transparency with regard to fees charged by local governments is something of a surprise. In Virginia, permit fees are typically readily available to the public,⁷⁰ and franchise agreements, licenses, and other local government contracts are not only public documents, but are adopted in open session by the governing body. There's nothing secret or hidden about them. Locating relevant documents may require the investment of some time online to search the minutes of meetings of a Board of Supervisors or City Council, the typical practice in Virginia is for such agreements to be readily available.

In any case, the Virginia Freedom of Information Act does not protect such information,⁷¹ and localities take their responsibilities under the Act seriously. The Virginia

⁷⁰ See nn. 29, 30. *See also*:

- Arlington County, Virginia, Building Arlington, Fee Schedules, <https://building.arlingtonva.us/resource/fee-schedules/> (last visited March 7, 2017);
- Henrico County, Virginia, County of Henrico Planning Applications Fee Schedule, <https://henrico.us/pdfs/planning/apps/fees.pdf> (effective September 13, 2011);
- City of Alexandria, Virginia, Department of Planning and Zoning Fee Schedule, https://www.alexandriava.gov/uploadedFiles/planning/info/forms/01_Master%20Fee%20Schedule%20updated%202_9%202015.pdf (effective July 1, 2015).

⁷¹ VIRGINIA CODE ANN. § 2.2-3700 et seq.

statute is stricter than the federal analogue, and both the presumption in favor of disclosure and the permitted exceptions are very clearly stated. Should there ever be any doubt about what agreements a locality has entered into and the terms of those agreements, the law provides a clear and strong remedy without any need for action by the Commission. Consequently, in Virginia local governments comply with the disclosure requirement of Section 253(c) as a matter of ordinary practice, and Mobilitie's request is superfluous.

If there is a problem with lack of access to information in this area, it arises with commercial entities that consider various kinds of payments and other contract terms to be confidential. For the reasons noted above, none of the Joint Commenters is in a position to honor requests for confidentiality with respect to individual agreements, but the Virginia FOIA does not apply to agreements between wireless companies and private property owners, and wireless providers seeking to use public property are not known for posting their rental rates online. Access to full, accurate, and readily available information would make the market work better because it would benefit anybody engaged in the wireless siting market. Consequently, were the Commission to regulate in this area, it might consider forbidding carriers from including confidentiality provisions in their agreements with real estate owners and right-of-way managers, and requiring carriers to publicly post the rates they pay.

In fact, requiring disclosure on one side but not on the other would distort the market. Markets depend on access to information in setting prices, and if one side to a transaction knows exactly what the other side has been willing to accept in the past, but the other side has no comparable information, that market will be inefficient. And if the federal government steps in and forces disclosure on one side but not the other, the federal government will be promoting inefficiency.

The *Notice* closes its discussion of this topic by asking whether lack of this information is a problem. Carriers and infrastructure providers know exactly what they are paying for the use of property, because they have entered into countless agreements with local owners of public and private property. Localities, on the other hand, have experience with at most a handful of right-of-way users or wireless tenants. If anybody is disadvantaged it is local governments. We urge the Commission to act fairly in this matter, if it acts at all.

V. THE COMMISSION SHOULD NOT PREJUDGE THE NEED FOR REGULATION.

The *Notice* seems to have been drafted under the influence of a number of misimpressions. These include:

- That local governments do not have reasonable concerns with respect to zoning or management of their rights-of-way;
- That a significant number of local governments is enforcing objectively unfair or unreasonable policies;
- That Mobilite and the wireless carriers consider every locality to be a current prospect for immediate deployment, and are capable of deploying everywhere at once;
- That immediate national action is required, or 5G technology will not be deployed within a reasonable timeframe;
- That Commission preemption of local authority will significantly speed deployment; and
- That there are no alternatives to preemption of local authority.

The Joint Commenters disagree with these statements. The facts about the practices and circumstances of local governments and the wireless industry do not support them.

Furthermore, the questions asked in the *Notice* will not develop a record that accurately reflects the facts. For example, the Commission has not asked basic questions that would reveal how extensive the harms alleged by Mobilitie may actually be. Here are just a few:

- How many local jurisdictions are there in the United States? How many of them actively manage their rights-of-way?
- How many have coverage gaps?
- How many of those jurisdictions does Mobilitie intend to serve within the next year? Five years? Ten years?
- When will Mobilitie and each of its customers begin deploying 5G technology to subscribers on more than a pilot basis? When do they expect to finish? Are all the carriers on the same timetable?
- How much capital is available at present to fund 5G construction for the next year? The next five years?
- How many complete siting applications have Mobilitie and each carrier formally submitted to local governments in each of the past five years?
- How many initial applications were rejected as incomplete?
- How many complete siting applications were granted, denied, or are currently pending? To put it another way, what percentage of applications were actually denied? Of those denied, how many were appealed?
- In how many communities, in how many states, is Mobilitie and each carrier currently operating?
- In how many communities does Mobilitie and each carrier currently have applications pending?
- In how many communities has Mobilitie and each carrier been completely refused access?
- In how many communities has Mobilitie and each carrier been granted the necessary permits for all requested sites?
- In how many communities did Mobilitie choose not to pursue one or more applications because of permit or contract terms that it could not or would not comply with?

- How long does it take Mobilitie to build on a site once all necessary permission is granted?
- In how many communities has Mobilitie been granted all necessary permission, but has not yet begun construction?
- If every pending application were granted tomorrow, how long would it take Mobilitie to complete construction? How much would construction cost? Does Mobilitie have sufficient cash on hand to cover such costs?
- What are the concerns and goals of local governments with respect to right-of-way management and antenna siting?
- What evidence is there that a significant number of local governments do not wish to have advanced wireless services promptly deployed within their boundaries?

The Commission's failure to ask any of these questions, or any number of others that might help an objective observer assess the full spectrum of relevant facts, strongly suggests that the Commission has already made up its mind. The *Notice* is not a request for a full and complete record; it is a request for information that supports Mobilitie's claims. Unless the Commission revises this inquiry by requesting substantially more information, addressing all of the relevant issues, the record will inevitably be skewed by the lack of information on the other side of the question.

For example, the Joint Commenters combined represent approximately 22% of the population of the Commonwealth of Virginia. As described above, even without the recent adoption of SB 1282, there was really no reason to believe that there are any legal requirements in Virginia that have been thwarting small cell or DAS deployment. We suspect that this is the case across the nation.

It is not in the interest of local elected officials to delay broadband wireless deployment. They must respond to the concerns of their constituents. Sometimes – but only sometimes –

those concerns may lead to what appear to federal regulators to be unreasonable outcomes. But this is because we live in a democracy and in a federal system, where local concerns matter and not everything is decided in Washington.

As it happens, Congress has attempted to balance local and federal concerns in this case. When a local decision appears to differ from federal policy, as set forth in Section 253(a), litigation may ensue, and it is natural for wireless providers and the Commission to focus on those cases. But making policy based on the claims of one interested party or group is not how the system is supposed to work. If the agency pursues its mandate too vigorously it will cross the “clear line.”

An objective examination, by any reasonable standard, would reveal that wireless deployment in this country proceeds apace. The Commission should ask itself: how many wireless facility sites exist in the continental United States? How many times have carriers sued local governments under either Section 253 or Section 332? We don’t know the answer, but we are confident that the first number is very large, the second quite small, and the proportion of the second to the first negligible. If the Commission doesn’t have this information, it should have requested it in the *Notice*.

Furthermore, although the Commission’s desire to deploy 5G technology quickly is itself reasonable, it is also reasonable for local governments to need time to play their part. Local governments have only begun to be confronted with the need to deploy small cell facilities because it is a new development. We urge the Commission to consider steps towards a more cooperative relationship, in which the wireless industry and the Commission acknowledge that local governments are partners in this venture, who deserve considerable credit for the success of deployment of wireless technology to date.

The Joint Commenters therefore ask the Commission to withdraw the *Notice* and if necessary replace it with an inquiry that is better suited to obtaining an accurate understanding of conditions on the ground.⁷² We understand that the FCC is trying to help the industry prepare for 5G deployment and we are willing to cooperate, but federal regulation is not appropriate at this time.

This is particularly true because the new Administration has directed agencies to reduce the number of regulations, and to eliminate regulations that are unnecessary, ineffective, or impose costs that exceed benefits.⁷³ Although not binding on independent agencies like the Commission, recently issued executive orders as well as legislation introduced in Congress indicate a shift in national policy toward careful examination of all new regulatory mandates. The FCC should not add to those mandates without clear authority and a clear need to intervene.

VI. INSTEAD OF ADOPTING RULES, THE COMMISSION SHOULD WORK WITH LOCAL GOVERNMENTS TO DEVELOP BEST PRACTICES FOR LOCAL GOVERNMENTS TO AID IN DEPLOYMENT OF 5G FACILITIES.

Given the many questions about the Commission's authority, particularly the Commission's lack of authority to enforce or interpret Section 253(c), the Joint Commenters strongly recommend that the agency consider alternatives to regulation. We believe that it would

⁷² Agencies are required to develop full and accurate records, and to draw rational conclusions from them. In *Communications Satellite Corp. v. FCC*, 836 F.2d 623 (D.C. Cir. 1988), for example, the D.C. Circuit reversed a Commission order because the agency, working from a "fragmentary" record, had failed to consider relevant facts, failed to consider important aspects of the problem before it, and had not established a rational connection between the record and its decision. More recently, in *National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1138-9 (D.C. Cir. 2013), the court remanded the EPA's order for failure to consider factors that could have affected the agency's decision.

⁷³ Executive Order 13777 (Mar. 1, 2017); Executive Order 13771 (Jan. 30, 2017).

be far more productive and efficient for the Commission to adopt a cooperative approach, in which the Commission and local government would jointly develop and promulgate best practices for accomplishing the Commission's policy goals.

The Commission could establish a working group, including representatives of small, medium-sized, and large jurisdictions from around the country, as well as Commission staff, to identify zoning and right-of-way management practices and procedures that have been shown to meet the industry's needs, while also protecting the public interest.

In this fashion, rather than promoting disputes and litigation over the scope of the Commission's authority and the application of its rules in individual cases, the Commission would be able to encourage state and local governments to modify their practices where necessary, and in the process obtain cooperation to make progress in areas that the Commission has no power to address. Creating a shot clock for zoning reviews under Section 332(c)(7) is one thing. Regulating local right-of-way permit fees is quite another. Such a collaborative approach would develop a clearer understanding of the essential role local governments play in the deployment of wireless facilities.

VII. IF THE COMMISSION DOES ADOPT RULES, IT SHOULD EXEMPT STATES THAT HAVE ENACTED THEIR OWN REGULATORY SCHEMES, AS THE COMMISSION HAS DONE WITH POLE ATTACHMENTS.

With the passage of SB 1282, the Virginia General Assembly has already addressed the principal concerns raised in the *Notice*. Wireless providers seeking to install small cells in local rights-of-way will no longer be required to obtain variances, special use permits, or special exceptions, and the grounds for denial of a zoning application have been restricted. Wireless providers also now have the benefit of statutory limits on certain permit fees and on the time

required for review of their applications. In other words, Virginia has acted promptly to help the wireless industry, and in the process has accomplished the Commission's goals. The Joint Commenters see no need for further Commission action, although we would be willing to support Commission efforts to develop nonbinding model practices or guidelines, as proposed above.

If, however, the Commission still feels compelled to act, we would urge the Commission to exempt from its rules those local governments that are located in states that have adopted small cell siting statutes like Virginia's. Not only would this approach encourage local cooperation by rewarding states that have acted on their own, but it would also increase the likelihood that new requirements are consistent with local law and practice. By avoiding unnecessary complexity and conflict, exempting states that have adopted their own rules would make compliance easier and therefore more likely.

The existing bifurcated approach to regulating pole attachments is very clear precedent for such an arrangement.⁷⁴ In that case, Congress explicitly called for the exemption of states that adopted their own pole attachment rules. Here, the Commission has no such express authority, but surely if the Commission believes it can adopt nationally binding right-of-way management rules, it can also create exceptions to those rules where its policy goals are met by other means.

⁷⁴ 47 U.S.C. § 224.

CONCLUSION

For all the foregoing reasons, the Commission should refrain from any further regulation of local government authority over the placement of wireless facilities.

Respectfully submitted,



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March 8, 2017

EXHIBIT A

SENATE BILL 1282

2017 SESSION

HOUSE SUBSTITUTE

17105460D

SENATE BILL NO. 1282

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Delegate Kilgore

on February 14, 2017)

(Patron Prior to Substitute—Senator McDougle)

A BILL to amend the Code of Virginia by adding in Chapter 22 of Title 15.2 an article numbered 7.2, consisting of sections numbered 15.2-2316.3, 15.2-2316.4, and 15.2-2316.5, and by adding in Title 56 a chapter numbered 15.1, consisting of sections numbered 56-484.26 through 56-484.31, relating to wireless communications infrastructure.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 22 of Title 15.2 an article numbered 7.2, consisting of sections numbered 15.2-2316.3, 15.2-2316.4, and 15.2-2316.5, and by adding in Title 56 a chapter numbered 15.1, consisting of sections numbered 56-484.26 through 56-484.31, as follows:

Article 7.2.

Zoning for Wireless Communications Infrastructure.

§ 15.2-2316.3. Definitions.

As used in this article, unless the context requires a different meaning:

"Antenna" means communications equipment that transmits or receives electromagnetic radio signals used in the provision of any type of wireless communications services.

"Base station" means a station that includes a structure that currently supports or houses an antenna, transceiver, coaxial cables, power cables, or other associated equipment at a specific site that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies, and other associated electronics.

"Co-locate" means to install, mount, maintain, modify, operate, or replace a wireless facility on, under, within, or adjacent to a base station, building, existing structure, utility pole, or wireless support structure. "Co-location" has a corresponding meaning.

"Department" means the Department of Transportation.

"Existing structure" means any structure that is installed or approved for installation at the time a wireless services provider or wireless infrastructure provider provides notice to a locality or the Department of an agreement with the owner of the structure to co-locate equipment on that structure. "Existing structure" includes any structure that is currently supporting, designed to support, or capable of supporting the attachment of wireless facilities, including towers, buildings, utility poles, light poles, flag poles, signs, and water towers.

"Micro-wireless facility" means a small cell facility that is not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height and that has an exterior antenna, if any, not longer than 11 inches.

"Small cell facility" means a wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume, or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet and (ii) all other wireless equipment associated with the facility has a cumulative volume of no more than 28 cubic feet, or such higher limit as is established by the Federal Communications Commission. The following types of associated equipment are not included in the calculation of equipment volume: electric meter, concealment, telecommunications demarcation boxes, back-up power systems, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.

"Utility pole" means a structure owned, operated, or owned and operated by a public utility, local government, or the Commonwealth that is designed specifically for and used to carry lines, cables, or wires for communications, cable television, or electricity.

"Water tower" means a water storage tank, or a standpipe or an elevated tank situated on a support structure, originally constructed for use as a reservoir or facility to store or deliver water.

"Wireless facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including (i) equipment associated with wireless services, such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services, such as microwave backhaul, and (ii) radio transceivers, antennas, coaxial, or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration.

"Wireless infrastructure provider" means any person that builds or installs transmission equipment, wireless facilities, or wireless support structures, but that is not a wireless services provider.

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"Wireless services" means (i) "personal wireless services" as defined in 47 U.S.C. § 332(c)(7)(C)(i); (ii) "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C)(ii), including commercial mobile services as defined in 47 U.S.C. § 332(d), provided to personal mobile communication devices through wireless facilities; and (iii) any other fixed or mobile wireless service, using licensed or unlicensed spectrum, provided using wireless facilities.

"Wireless services provider" means a provider of wireless services.

"Wireless support structure" means a freestanding structure, such as a monopole, tower, either guyed or self-supporting, or suitable existing structure or alternative structure designed to support or capable of supporting wireless facilities. "Wireless support structure" does not include any telephone or electrical utility pole or any tower used for the distribution or transmission of electrical service.

§ 15.2-2316.4. Zoning; small cell facilities.

A. A locality shall not require that a special exception, special use permit, or variance be obtained for any small cell facility installed by a wireless services provider or wireless infrastructure provider on an existing structure, provided that the wireless services provider or wireless infrastructure provider (i) has permission from the owner of the structure to co-locate equipment on that structure and (ii) notifies the locality in which the permitting process occurs.

B. Localities may require administrative review for the issuance of any required zoning permits for the installation of a small cell facility by a wireless services provider or wireless infrastructure provider on an existing structure. Localities shall permit an applicant to submit up to 35 permit requests on a single application. In addition:

1. A locality shall approve or disapprove the application within 60 days of receipt of the complete application. Within 10 days after receipt of an application and a valid electronic mail address for the applicant, the locality shall notify the applicant by electronic mail whether the application is incomplete and specify any missing information; otherwise, the application shall be deemed complete. Any disapproval of the application shall be in writing and accompanied by an explanation for the disapproval. The 60-day period may be extended by the locality in writing for a period not to exceed an additional 30 days. The application shall be deemed approved if the locality fails to act within the initial 60 days or an extended 30-day period.

2. A locality may prescribe and charge a reasonable fee for processing the application not to exceed:

a. \$100 each for up to five small cell facilities on a permit application; and

b. \$50 for each additional small cell facility on a permit application.

3. Approval for a permit shall not be unreasonably conditioned, withheld, or delayed.

4. The locality may disapprove a proposed location or installation of a small cell facility only for the following reasons:

a. Material potential interference with other pre-existing communications facilities or with future communications facilities that have already been designed and planned for a specific location or that have been reserved for future public safety communications facilities;

b. The public safety or other critical public service needs;

c. Only in the case of an installation on or in publicly owned or publicly controlled property, excluding privately owned structures where the applicant has an agreement for attachment to the structure, aesthetic impact or the absence of all required approvals from all departments, authorities, and agencies with jurisdiction over such property; and

d. Conflict with an applicable local ordinance adopted pursuant to § 15.2-2306 or pursuant to local charter on a historic property that is not eligible for the review process established under 54 U.S.C. § 306108.

5. Nothing shall prohibit an applicant from voluntarily submitting, and the locality from accepting, any conditions that otherwise address potential visual or aesthetic effects resulting from the placement of small cell facilities.

6. Nothing in this section shall preclude a locality from adopting reasonable rules with respect to the removal of abandoned wireless support structures or wireless facilities.

C. Notwithstanding anything to the contrary in this section, the installation, placement, maintenance, or replacement of micro-wireless facilities that are suspended on cables or lines that are strung between existing utility poles in compliance with national safety codes shall be exempt from locality-imposed permitting requirements and fees.

§ 15.2-2316.5. Moratorium prohibited.

A locality shall not adopt a moratorium on considering zoning applications submitted by wireless services providers or wireless infrastructure providers.

CHAPTER 15.1.

WIRELESS COMMUNICATIONS INFRASTRUCTURE.

§ 56-484.26. Definitions.

As used in this chapter, unless the context requires a different meaning:

122 "Antenna" means communications equipment that transmits or receives electromagnetic radio signals
123 used in the provision of any type of wireless communications services.

124 "Co-locate" means to install, mount, maintain, modify, operate, or replace a wireless facility on,
125 under, within, or adjacent to a base station, building, existing structure, utility pole, or wireless support
126 structure. "Co-location" has a corresponding meaning.

127 "Department" means the Department of Transportation.

128 "Districtwide permit" means a permit granted by the Department to a wireless services provider or
129 wireless infrastructure provider that allows the permittee to use the rights-of-way under the
130 Department's jurisdiction to install or maintain small cell facilities on existing structures in one of the
131 Commonwealth's nine construction districts. A districtwide permit allows the permittee to perform
132 multiple occurrences of activities necessary to install or maintain small cell facilities on non-limited
133 access right-of-way without obtaining a single use permit for each occurrence. The central office permit
134 manager shall be responsible for the issuance of all districtwide permits. The Department may authorize
135 districtwide permits covering multiple districts.

136 "Existing structure" means any structure that is installed or approved for installation at the time a
137 wireless services provider or wireless infrastructure provider provides notice to a locality or the
138 Department of an agreement with the owner of the structure to co-locate equipment on that structure.
139 "Existing structure" includes any structure that is currently supporting, designed to support, or capable
140 of supporting the attachment of wireless facilities, including towers, buildings, utility poles, light poles,
141 flag poles, signs, and water towers.

142 "Micro-wireless facility" means a small cell facility that is not larger in dimension than 24 inches in
143 length, 15 inches in width, and 12 inches in height and that has an exterior antenna, if any, not longer
144 than 11 inches.

145 "Small cell facility" means a wireless facility that meets both of the following qualifications: (i) each
146 antenna is located inside an enclosure of no more than six cubic feet in volume, or, in the case of an
147 antenna that has exposed elements, the antenna and all of its exposed elements could fit within an
148 imaginary enclosure of no more than six cubic feet and (ii) all other wireless equipment associated with
149 the facility has a cumulative volume of no more than 28 cubic feet, or such higher limit as is
150 established by the Federal Communications Commission. The following types of associated equipment
151 are not included in the calculation of equipment volume: electric meter, concealment,
152 telecommunications demarcation boxes, ground-based enclosures, back-up power systems, grounding
153 equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power
154 and other services.

155 "Utility pole" means a structure owned, operated, or owned and operated by a public utility, local
156 government, or the Commonwealth that is designed specifically for and used to carry lines, cables, or
157 wires for communications, cable television, or electricity.

158 "Water tower" means a water storage tank, or a standpipe or an elevated tank situated on a support
159 structure, originally constructed for use as a reservoir or facility to store or deliver water.

160 "Wireless facility" means equipment at a fixed location that enables wireless services between user
161 equipment and a communications network, including (i) equipment associated with wireless services,
162 such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed
163 wireless services, such as microwave backhaul, and (ii) radio transceivers, antennas, coaxial, or
164 fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of
165 technological configuration.

166 "Wireless infrastructure provider" means any person, including a person authorized to provide
167 telecommunications service in the state, that builds or installs transmission equipment, wireless facilities,
168 or wireless support structures, but that is not a wireless services provider.

169 "Wireless services" means (i) "personal wireless services" as defined in 47 U.S.C. § 332(c)(7)(C)(i);
170 (ii) "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C)(ii), including commercial
171 mobile services as defined in 47 U.S.C. § 332(d), provided to personal mobile communication devices
172 through wireless facilities; and (iii) any other fixed or mobile wireless service, using licensed or
173 unlicensed spectrum, provided using wireless facilities.

174 "Wireless services provider" means a provider of wireless services.

175 "Wireless support structure" means a freestanding structure, such as a monopole, tower, either guyed
176 or self-supporting, or suitable existing structure or alternative structure designed to support or capable
177 of supporting wireless facilities. "Wireless support structure" does not include any telephone or
178 electrical utility pole or any tower used for the distribution or transmission of electrical service.

179 § 56-484.27. Access to the public rights-of-way by wireless services providers and wireless
180 infrastructure providers; generally.

181 A. No locality or the Department shall impose on wireless services providers or wireless
182 infrastructure providers any restrictions or requirements concerning the use of the public rights-of-way,

including the permitting process, the zoning process, notice, time and location of excavations and repair work, enforcement of the statewide building code, and inspections, that are unfair, unreasonable, or discriminatory.

B. No locality or the Department shall require a wireless services provider or wireless infrastructure provider to provide in-kind services or physical assets as a condition of consent to use public rights-of-way or easements. This shall not limit the ability of localities, their authorities or commissions that provide utility services, or the Department to enter into voluntary pole attachment, tower occupancy, conduit occupancy, or conduit construction agreements with wireless services providers or wireless infrastructure providers.

C. No locality or the Department shall adopt a moratorium on considering requests for access to the public rights-of-way from wireless services providers or wireless infrastructure providers.

§ 56-484.28. Access to public rights-of-way operated and maintained by the Department for the installation and maintenance of small cell facilities on existing structures.

A. Upon application by a wireless services provider or wireless infrastructure provider, the Department shall issue a districtwide permit, consistent with applicable regulations that do not conflict with this chapter, granting access to public rights-of-way that it operates and maintains to install and maintain small cell facilities on existing structures in the rights-of-way. The application shall include a copy of the agreement under which the applicant has permission from the owner of the structure to the co-location of equipment on that structure. If the application is received on or after September 1, 2017, (i) the Department shall issue the districtwide permit within 30 days after receipt of the application and (ii) the districtwide permit shall be deemed granted if not issued within 30 days after receipt of the complete application. Within 10 days after receipt of an application and a valid electronic mail address for the applicant, the Department shall notify the applicant by electronic mail whether the application is incomplete and specify any missing information; otherwise, the application shall be deemed complete. A districtwide permit issued for the original installation shall allow the permittee to repair, replace, or perform routine maintenance operations to small cell facilities once installed.

B. The Department may require a separate single use permit to allow a wireless services provider or wireless infrastructure provider to install and maintain small cell facilities on an existing structure when such activity requires (i) working within the highway travel lane or requiring closure of a highway travel lane; (ii) disturbing the pavement, shoulder, roadway, or ditch line; (iii) placement on limited access rights-of-way; or (iv) any specific precautions to ensure the safety of the traveling public or the protection of public infrastructure or the operation thereof. Upon application by a wireless services provider or wireless infrastructure provider, the Department may issue a single use permit granting access to install and maintain small cell facilities in such circumstances. If the application is received on or after September 1, 2017, (a) the Department shall approve or disapprove the application within 60 days after receipt of the application, which 60-day period may be extended by the Department in writing for a period not to exceed an additional 30 days and (b) the application shall be deemed approved if the Department fails to approve or disapprove the application within the initial 60 days and any extension thereof. Any disapproval of an application for a single use permit shall be in writing and accompanied by an explanation of the reasons for the disapproval.

C. The Department shall not impose any fee for the use of the right-of-way on a wireless services provider or wireless infrastructure provider to attach or co-locate small cell facilities on an existing structure in the right-of-way. However, the Department may prescribe and charge a reasonable fee not to exceed \$250 for processing an application for a districtwide or single use permit.

D. The Department shall not impose any fee or require a permit for the installation, placement, maintenance, or replacement of micro-wireless facilities that are suspended on cables or lines that are strung between existing utility poles in compliance with national safety codes. However, the Department may require a single use permit if such activities (i) involve working within the highway travel lane or require closure of a highway travel lane; (ii) disturb the pavement, shoulder, roadway, or ditch line; (iii) include placement on limited access rights-of-way; or (iv) require any specific precautions to ensure the safety of the traveling public or the protection of public infrastructure or the operation thereof, and either were not authorized in or will be conducted in a time, place, or manner that is inconsistent with terms of the existing permit for that facility or the structure upon which it is attached.

§ 56-484.29. Access to locality rights-of-way for installation and maintenance of small cell facilities on existing structures.

A. Upon application by a wireless services provider or wireless infrastructure provider, a locality may issue a permit granting access to the public rights-of-way it operates and maintains to install and maintain small cell facilities on existing structures. Such a permit shall grant access to all rights-of-way in the locality for the purpose of installing small cell facilities on existing structures, provided that the wireless services provider or wireless infrastructure provider (i) has permission from the owner of the structure to co-locate equipment on that structure and (ii) provides notice of the agreement and co-location to the locality. The locality shall approve or disapprove any such requested permit within 60

days of receipt of the complete application. Within 10 days after receipt of an application and a valid electronic mail address for the applicant, the locality shall notify the applicant by electronic mail whether the application is incomplete and specify any missing information; otherwise, the application shall be deemed complete. Any disapproval shall be in writing and accompanied by an explanation for the disapproval. The 60-day period may be extended by the locality in writing for a period not to exceed an additional 30 days. The permit request shall be deemed approved if the locality fails to act within the initial 60 days or an extended 30-day period. No such permit shall be required for providers of telecommunications services and nonpublic providers of cable television, electric, natural gas, water, and sanitary sewer services that, as of July 1, 2017, already have facilities lawfully occupying the public rights-of-way under the locality's jurisdiction.

B. Localities shall not impose any fee for the use of the rights-of-way, except for zoning, subdivision, site plan, and comprehensive plan fees of general application, on a wireless services provider or wireless infrastructure provider to attach or co-locate small cell facilities on an existing structure in the right-of-way. However, a locality may prescribe and charge a reasonable fee not to exceed \$250 for processing a permit application under subsection A.

C. Localities shall not impose any fee or require any application or permit for the installation, placement, maintenance, or replacement of micro-wireless facilities that are suspended on cables or lines that are strung between existing utility poles in compliance with national safety codes. However, the locality may require a single use permit if such activities (i) involve working within the highway travel lane or require closure of a highway travel lane; (ii) disturb the pavement, shoulder, roadway, or ditch line; (iii) include placement on limited access rights-of-way; or (iv) require any specific precautions to ensure the safety of the traveling public or the protection of public infrastructure or the operation thereof, and either were not authorized in or will be conducted in a time, place, or manner that is inconsistent with terms of the existing permit for that facility or the structure upon which it is attached.

§ 56-484.30. Agreements for use of public right-of-way to construct new wireless support structures; relocation of wireless support structures.

Subject to any applicable requirements of Article VII, Section 9 of the Constitution of Virginia, public right-of-way permits or agreements for the construction of wireless support structures issued on or after July 1, 2017, shall be for an initial term of at least 10 years, with at least three options for renewal for terms of five years, subject to terms providing for earlier termination for cause or by mutual agreement. Nothing herein is intended to prohibit the Department or localities from requiring permittees to relocate wireless support structures when relocation is necessary due to a transportation project or material change to the right-of-way, so long as other users of the right-of-way are required to relocate. Such relocation shall be completed as soon as reasonably possible within the time set forth in any written request by the Department or a locality for such relocation, as long as the Department or a locality provides the permittee with a minimum of 180 days' advance written notice to comply with such relocation, unless circumstances beyond the control of the Department or the locality require a shorter period of advance notice. The permittee shall bear only the proportional cost of the relocation that is caused by the transportation project and shall not bear any cost related to private benefit or where the permittee was on private right-of-way. If the locality or the Department bears any of the cost of the relocation, the permittee shall not be obligated to commence the relocation until it receives the funds for such relocation. The permittee shall have no liability for any delays caused by a failure to receive funds for the cost of such relocation, and the Department or a locality shall have no obligation to collect such funds. If relocation is deemed necessary, the Department or locality shall work cooperatively with the permittee to minimize any negative impact to the wireless signal caused by the relocation. There may be emergencies when relocation is required to commence in an expedited manner, and in such situations the permittee and the locality or Department shall work diligently to accomplish such emergency relocation.

§ 56-484.31. Attachment of small cell facilities on government-owned structures.

A. If the Commonwealth or a locality agrees to permit a wireless services provider or a wireless infrastructure provider to attach small cell facilities to government-owned structures, both the government entity and the wireless services or wireless infrastructure provider shall negotiate in good faith to arrive at a mutually agreeable contract terms and conditions.

B. The rates, terms, and conditions for such agreement shall be just and reasonable, cost-based, nondiscriminatory, and competitively neutral, and shall comply with all applicable state and federal laws. However, rates for attachments to government-owned buildings may be based on fair market value.

C. For utility poles owned by a locality or the Commonwealth that support aerial cables used for video, communications, or electric service, the parties shall comply with the process for make-ready work under 47 U.S.C. § 224 and implementing regulations. The good faith estimate of the government

entity owning or controlling the utility pole for any make-ready work necessary to enable the utility pole to support the requested co-location shall include pole replacement if necessary.

D. For utility poles owned by a locality or the Commonwealth that do not support aerial cables used for video, communications, or electric service, the government entity owning or controlling the utility pole shall provide a good faith estimate for any make-ready work necessary to enable the utility pole to support the requested co-location, including pole replacement, if necessary, within 60 days after receipt of a complete application. Make-ready work, including any pole replacement, shall be completed within 60 days of written acceptance of the good faith estimate by the wireless services provider or a wireless infrastructure provider.

E. The government entity owning or controlling the utility pole shall not require more make-ready work than required to meet applicable codes or industry standards. Charges for make-ready work, including any pole replacement, shall not exceed actual costs or the amount charged to other wireless services providers, providers of telecommunications services, and nonpublic providers of cable television and electric services for similar work and shall not include consultants' fees or expenses.

F. The annual recurring rate to co-locate a small cell facility on a government-owned utility pole shall not exceed the actual, direct, and reasonable costs related to the wireless services provider's or wireless infrastructure provider's use of space on the utility pole. In any controversy concerning the appropriateness of the rate, the government entity owning or controlling the utility pole shall have the burden of proving that the rates are reasonably related to the actual, direct, and reasonable costs incurred for use of space on the utility pole for such period.

G. This section shall not apply to utility poles, structures, or property of an electric utility owned or operated by a municipality or other political subdivision.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

Streamlining Deployment of Small)
Cell Infrastructure by Improving)
Wireless Facilities Siting Policies;)
)

Mobilitie, LLC, Petition for)
Declaratory Ruling)
)
_____)

WT Docket No. 16-421

**DECLARATION OF CHRIS CAPERTON
IN SUPPORT OF REPLY COMMENTS OF THE
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA**

I, Chris Caperton, declare as follows:

1. I submit this Declaration in support of the Reply Comments of the Board of Supervisors of Fairfax County, Virginia, in response to the Comments submitted by Crown Castle International Corporation and its subsidiaries (Crown Castle) in the above matter (Petition). I am fully competent to testify to the facts set forth herein, and if called as a witness, would testify to them.
2. I am the Assistant Director of the Planning Division, Fairfax County Department of Planning and Zoning, responsible for the receipt, acceptance, review, approval and recommendations associated with telecommunication applications. I have served in that capacity since January of 2011. In the course of my duties, I routinely accept, analyze, and recommend for approval applications for telecommunications monopolies, towers,

small cells, Distributed Antenna Systems, and other facility co-locations in Fairfax County.

3. In the course of my duties as Assistant Director, I read Crown Castle's Comments submitted in response to the Petition. I am submitting this Declaration to correct several misstatements in Crown Castle's submission.
4. In Tysons, Virginia, located within Fairfax County, new structures are not "prohibited" within the public rights-of-way contrary to Crown Castle's misrepresentation. In fact, County staff has met with Crown Castle representatives five (5) times over the past year to assist them in locating their telecommunication facilities within Tysons' rights-of-way in a manner that is consistent with the County's Comprehensive Plan's Design Guidelines. The Comprehensive Plan was enacted in a public process that requires advertisement of the specific proposals and public hearings as required by state law. The Plan encourages co-location of telecommunications facilities inside and outside of the right-of-way but does not prohibit new structures.
5. Crown Castle was encouraged, but not required, to communicate with the Tysons Corner Land Use Task Force (Task Force) about design options, which Crown Castle refused to do. The County organized this advisory Task Force of representatives from various private commercial sectors, state government, and the community at large to study and report on proposals for Comprehensive Plan provisions in the rapidly developing area of Tysons. The Task Force has a wealth of information to benefit Crown Castle and other entities. However, the County does not *require* any applicants to apply to the Task Force.
6. By email dated July 5, 2016 (attached), the County specifically offered Crown Castle the opportunity to submit applications for multiple facilities simultaneously in one batch to

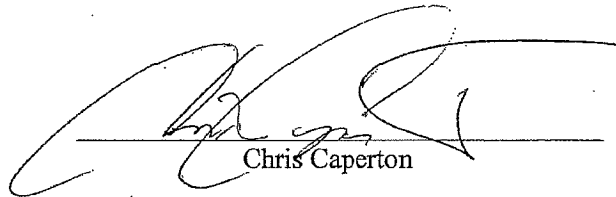
be considered together and be charged a fee for only one application ("batched application"). Crown Castle is mistaken when it states that Fairfax County would subject each separate facility to a separate special exception process and fee.

7. Further, Virginia's Senate Bill 1282 (2017) (which is expected to take effect July 1, 2017) would require localities to process small cell facilities administratively when the facilities would be installed on an existing structure, such as a utility or light pole, and sets a graduated fee schedule that is capped at \$2,000 per batch of applications.
8. Fairfax County received over 650 telecommunications applications from 2010–2016, and denied only 4 of those applications to the best of my knowledge and belief.
9. During the period from 2010–2016, Crown Castle submitted 5 applications for co-locations on utility poles. All 5 applications were accepted, reviewed, and approved within 14–25 calendar days. None of these Crown Castle applications were denied by County staff, the Planning Commission, or the Board of Supervisors.
10. In March of 2016, Crown Castle submitted applications for 19 stand-alone telecommunications poles to be located within the right-of-way in the Tysons area. The County provided comments on the applications to Crown Castle in May, 2016. To date, Crown Castle has not formally responded to the County's comments. Crown Castle requested an extension of the review period, first, until March 15, 2017, and then again until April 15, 2017, in order to pursue other siting options.
11. Fairfax County staff has consistently tried to assist Crown Castle in locating its facilities in Tysons and will continue to do so in the future.
12. In 2016, Fairfax County accepted, reviewed, and approved 80 DAS nodes in 3 batched applications containing 25, 32, and 23 nodes.

13. The Planning Commission and Board of Supervisors collectively complete their review of new telecommunications facilities (i.e., monopolies) within less than 150 days from date of acceptance, unless that time is extended by the applicant. Co-locations reviewed outside the scope of the Spectrum Act (codified at 47 U.S.C. §1455) are processed within 90 days (excluding time tolled by the applicant) and co-locations reviewed under the Spectrum Act are processed within 60 days.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on April 7, 2017, in Fairfax, Virginia.


Chris Caperton

From: Caperton, Chris B
Sent: Tuesday, July 05, 2016 5:45 PM
To: Butch Salamone (bsalamone@nbcllc.com) <bsalamone@nbcllc.com>
Subject: RE: Special Exception Fee

Butch —

My supervisor informed me that there is still some confusion re how a multiple site DAS such as the one at Tysons would be processed re the SE filing fee. DPZ has indicated to the Board of Supervisors that we will work with applicants to bundle DAS applications so that there is only one SE filing fee.

Thanks C

From: Caperton, Chris B
Sent: Tuesday, July 05, 2016 10:38 AM
To: Butch Salamone (bsalamone@nbcllc.com)
Subject: FW: Special Exception Fee

From: Kirst, Lorrie
Sent: Tuesday, July 05, 2016 10:35 AM
To: Caperton, Chris B
Subject: RE: Special Exception Fee

A fee of \$16,375 is correct for a telecommunication SE

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Accelerating Wireless Broadband Deployment
by Removing Barriers to Infrastructure
Investment

FCC 17-38

WT Docket No. 17-79

**DECLARATION OF CHRIS CAPERTON
IN SUPPORT OF COMMENTS OF
FAIRFAX COUNTY, VIRGINIA**

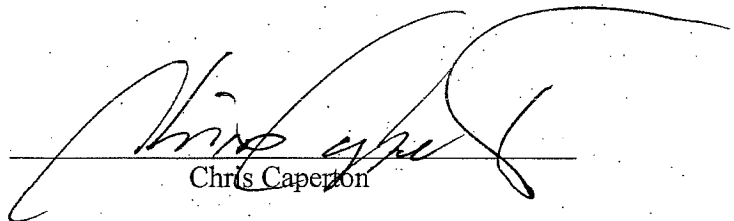
I, Chris Caperton, declare as follows:

1. I submit this Declaration in support of the Comments of Fairfax County, Virginia, in response to the Notice of Proposed Rulemaking and Notice of Inquiry in the above matter (NPRM/NOI). I am fully competent to testify to the facts set forth herein, and if called as a witness, would testify to them.
2. I am the Assistant Director of the Planning Division, Fairfax County Department of Planning and Zoning, responsible for the receipt, acceptance, review, approval and recommendations associated with telecommunication applications. I have served in that capacity since January of 2011. In the course of my duties, I routinely accept, analyze, and recommend for approval applications for telecommunications monopoles, towers, small cell facilities, Distributed Antenna Systems, and other facility co-locations in Fairfax County.
3. In Fiscal Year 2016, Fairfax County received and approved 115 applications under the Spectrum Act.

4. Approximately half of wireless telecommunications applications are incomplete or include inconsistencies when submitted. Applications frequently fail to accurately depict the number and diameter of proposed antennas or the application describes the proposed location of the facility only in general terms, without the precise location or size of the proposed facility and/or the number, location, and size of the proposed antennas. Applicants do not always respond to staff requests to correct deficiencies.
5. Additionally, staff review often reveals siting issues that can include the facility proposed in a location that is not accurately depicted on the plat, a compound plan that does not have the correct fence type or height depicted on the application, or the application representing a condition that is not the current existing condition based on a review of past approvals or a site visit.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on JUNE 15, 2017, in Fairfax, Virginia.


Chris Caperton

From: Deployment Alerts

Sent: Tuesday, April 25, 2017 3:24 PM

To: SCM-DO Distro <SCMDODistro@sprint.com>; Network Leaders - ALL <NetworkLeaders-ALL@sprint.com>; SprintAlerts@mobilitie.com

Subject: DO Deployment Alert: Mini Macro Trial



As you know, we initiated a trial in Feb across both the mini macro and monopole programs which concluded at the end of March. The trial granted Mobilitie permission to commence construction without necessarily securing certain build pre-requisites. Also the threshold to secure approval through CCB for 'expensive' sites was increased from \$30k/site to \$60k/site. The major objectives from this trial were to:

increase the rate of delivery of mini macros on-air, and monopoles installed beyond the existing rates experienced to date, and better understand the impacts of the existing governance and approval thresholds on deployment rates and whether they were balanced in facilitating rapid delivery whilst also protecting against program risk (e.g.; stranded assets, cost over-runs etc.)

Following the conclusion of the trial, a review of the outcomes was conducted, which are detailed below:

A. Mini macro on-air delivery rates

Masa has regularly reiterated, most recently as last week, that our objective is to maximize sites 'on-air'. While the results of the trial showed an increase in the rate of sites built per week, there was no consequent increase in the weekly rate of sites being commissioned. What's more concerning is that since the trial, the weekly rate of sites being commissioned has instead declined from an average of 33/week pre-trial to 6/week during and post-trial. The root-cause of this decline has yet to be confirmed and further investigation is underway to determine the cause/s of this decline. That said, while it is premature to attribute this decline to the trial, it is appropriate to conclude that the trial did not increase the rate of sites on-air per week.

B. Mini macros built without permanent power

There is sufficient evidence from the trial to conclude that commencing construction before permanent power is scheduled, increases site build rates without substantially increasing the risk of abandoned work. In addition, conducting operational testing of built sites using 'temporary power' allows us to identify hardware faults or commissioning issues which can then be rectified at the time permanent power is delivered and the site is commissioned. That said, given A. above, a consequence of allowing sites to be built prior to scheduled permanent power is an increasing stockpile of built sites which cannot then proceed into the commissioning phase creating a downstream commissioning 'bottleneck'. Claiming these sites to be 'construction complete' artificially increases claimed milestone delivery but without any downstream benefit, which creates an unrealistic expectation of rapid conversion to sites on-air, which cannot be met.

C. Mini macros built without full AZP

Similarly to B. above, allowing sites to commence construction without fully completing regulatory compliance (power design, NEPA, SHPO, etc.) increases the weekly rate of sites commencing construction, however, the findings of the trial showed that 'breaking the process' to facilitate this, created downstream issues which also constricted the commissioning process resulting in fewer sites on-air (CIQ delays etc.). In addition, commencing construction prior to securing all regulatory approvals exposes both Sprint and Mobilitie to reputational risk without enjoying any tangible on-air benefit.

D. Mini macrosbuilt with backhaul solution

Throughout the duration of the trial, only a small number of sites were deployed without a known backhaul solution identified. This small incidence suggests that there is no expected substantial improvement to on-air which can be attributed to deploying sites without a known backhaul solution which balances the risk of building 'stranded sites'.

E. Increasing the CCB threshold from \$30k to \$60k

There were no cases throughout the trial period that increasing the financial threshold to \$60k resulted in any improvements in delivery outcomes.

F. Deploying stacked steel monopoles

It was confirmed through the trial that the difference in the final cost to stand-up a monopole between the stacked steel option and the fully equipped canister was negligible. Secondly, the stacked steel option avoids any potential equipment warrantee issues; and finally, the stacked steel option is consistent with the stated land-use permit application of a transport only pole, reducing any potential allegation that this proposal contravenes the approved land-use permit.

Conclusions

Based on the joint experiences and learnings from the trial, it makes sense to continue with the following conclusions:

Sprint and Mobilitie continue to focus on and manage the program to achieve sites 'on-air' as opposed to 'installations complete'.

Mobilitie can continue to commence building sites prior to permanent power being scheduled, however, the milestone 'construction complete' cannot be claimed until both the site is built and permanent power is delivered to the site.

Mobilitie cannot commence building sites without full AZP

Mobilitie cannot commence building sites without a confirmed backhaul solution

The threshold of \$30k remains unchanged

Mobilitie can continue to deploy the 'stacked steel' monopole option.

Thanks,

Chris Mills

Vice President, Network Deployment

O: 913-315-3133 / M: 913-609-9335